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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

LITTLE FOREST MEDICAL CENTER OF AKRON,
Petitioner,

vs.

OHIO CIVIL RIGHTS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether gender (female) can be used as a bona fide occupational qualification for employment ("BFOQ"), under Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Chapter 4112, in a patient care position in a nursing home where female residents have expressed a desire for care by a member of the same sex.

2. Does a nursing home employer satisfy its burden of persuasion in a BFOQ defense by showing a legitimate privacy concern for its female patients or must it go further and prove that a reasonable accommodation cannot be made in the workplace and thereby avoid its reliance on gender as a BFOQ?

3. Whether the Court's ruling in *Ford Motor Company v. EEOC*, 458 U.S. 219 (1981), requires that an offer of employment be in the "career track" of the discriminatee in order to toll the employer's back pay liability, despite the fact that the employer has offered employment at a higher rate of pay and in a position having the same terms and conditions of employment.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Petitioner, Little Forest Medical Center of Akron, is a corporation with no parent or subsidiary corporations. The Ohio Civil Rights Commission is also a party to the instant action.

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Little Forest Medical Center of Akron, hereby petitions the Court to issue a writ of certiorari to review the judgment of the Ohio Supreme Court entered on September 4, 1991.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is officially reported at 61 Ohio St. 3d 607 and is printed in the Appendix at page A1.

The decision of the Ohio Court of Appeals for the Ninth Judicial District is unreported and is printed in the Appendix at page A30. The finding and order of the Ohio Court of Common Pleas is also unreported and is printed in the Appendix at page A39. Finally, the decision of the Ohio Civil Rights Commission is unreported and is printed in the Appendix at page A42.

JURISDICTION

The judgment of the Ohio Supreme Court (Appendix at page A28) was entered on September 4, 1991. A motion for reconsideration was denied on October 16, 1991.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1257 which allows for the issuance of a writ of certiorari to review the decision of a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The instant case involves several constitutional provisions and statutes (which are printed in the Appendix) as follows: Title VII of the Civil Rights Act of 1964 (Appendix at page A60), §4201 of the Omnibus Budget Reconciliation Act of 1987 (Appendix at page A73) and certain Procedural Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. 1601.13 (Appendix at page A76). In addition, this case involves Ohio's anti-discrimination statute, Ohio Revised Code §4112.02 (Appendix at page A90) and the Ohio law known as the "Patient Bill of Rights," Ohio Revised Code §3721.13 (Appendix at page A82).

STATEMENT OF THE CASE

Little Forest Medical Center of Akron ("Little Forest") operates a skilled nursing facility in Akron, Ohio providing health care services to an overwhelming majority of elderly female patients. Virtually all patients at Little Forest require total care meaning that these patients require assistance with all activities of daily living including bathing and dressing. Eighty percent of the patients are female. Patient care is given by a staff of registered nurses, licensed practical nurses and nurse's aides.

Nurse's aides provide intimate personal care to the patients which includes bathing the patients, assisting in the patient's use of bed pans, providing bowel and bladder training for patients and giving enemas.

On June 19, 1986, Rayferd Lawson, a male, applied for employment with Little Forest as a nurse's aide. Lawson was rejected for employment as an aide out of respect for the privacy rights of the female patients who had expressed a desire that they be attended to only by members of the same sex.

On October 29, 1986, Lawson filed a charge of discrimination with the Ohio Civil Rights Commission ("Commission") and the Equal Employment Opportunity Commission ("EEOC"). The Ohio Civil Rights Commission investigated the charge pursuant to a work sharing agreement which it had with the EEOC. Little Forest defended its decision to deny employment to Lawson on the basis that sex (female) is a bona fide occupational qualification ("BFOQ") for employment at Little Forest as a nurse's aide under state and federal law. The Commission rejected the BFOQ defense and issued a determination that it was "probable" that Lawson was unlawfully discriminated against on the basis of his sex.

Shortly thereafter, Little Forest made Lawson an unconditional offer of employment to work in the maintenance department of the nursing home, which offer was rejected by Lawson.

The Commission issued a complaint against Little Forest on July 9, 1987. Little Forest filed an answer with the Commission in which it asserted the BFOQ defense.[1] In addition, Little Forest argued that the unconditional offer of employment it made to Lawson tolled the Company's liability, if any, for back pay.[2]

A trial was held on the merits before a Hearing Officer appointed by the Commission. Little Forest again argued that the BFOQ defense should exonerate it based upon the privacy rights of the female patients.[3] In addition, Little Forest argued that once it had demonstrated the legitimacy of sex as a BFOQ, the Commission had the burden to prove that reasonable alternatives existed in the workplace which would allow the employment of a male aide without sacrificing the privacy of objecting female patients.[4]

The Hearing Officer issued a recommended finding and order which stated that Little Forest must prove that there was a factual basis for its belief that women would object to intimate contact by male nurse's aides *and* that Little Forest must show that it would not be possible for Little Forest to reassign job responsiblities in order to minimize the clash between the patients' rights of privacy and the anti-discrimination laws.[5] Thus,

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[1] Answer at Appendix page A104 (hereinafter all references to the Appendix are designated as "Appx. p. _____").
[2] *Id.* at Appx. p. A105.
[3] Brief of Respondent at Appx. p. A107.
[4] *Id.* at Appx. p. A108.
[5] Hearing Examiner's Report and Recommendations at Appx. p. A56.

the Hearing Officer rejected Little Forest's argument that the burden of proof on the second issue (*i.e.* altering the work environment to permit employment of a male aide) was on the Commission.

The Hearing Officer ruled that Little Forest had a legitimate basis to use sex as a BFOQ for employment as an aide. However, he further ruled that Little Forest had failed to show that it could not give Lawson employment somewhere else in the facility and still respect the privacy of female patients. He, therefore, recommended that the Commission issue a remedial order against Little Forest.[6]

On the issue of back pay, the Hearing Officer ruled that the offer of employment made by Little Forest did not toll the Company's liability for back pay because Little Forest did not offer Lawson employment as an aide.[7]

Little Forest filed objections to the Hearing Officer's report and recommendations.[8] The Commission rejected Little Forest's arguments on all issues and entered a finding against Little Forest.[9]

An appeal was taken by Little Forest from the Commission's order to the Court of Common Pleas for Summit County, Ohio. In its first assignment of error, Little Forest stated that the burden of proof should be on the Commission to prove that a reasonable accommodation could be made by the employer.[10] Little Forest also argued that its unconditional offer of employment tolled its liability for back pay.[11] The Court of Common Pleas affirmed the Commission's ruling.[12]

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[6] *Id.* at Appx. p. A57.
[7] *Id.* at Appx. p. A58, n.1.
[8] Objections to Report and Recommendations at Appx. p. A110.
[9] Findings of Fact, Conclusions of Law and Order at Appx. pp. A48, 49.
[10] Brief of Petitioner at Appx. p. A112.
[11] *Id.* at Appx. p. A113.
[12] Decision of Court of Common Pleas.

Thereafter, Little Forest appealed to the Ohio Court of Appeals for the Ninth Judicial District. As before, Little Forest argued that the Commission erred when it ruled that the burden of proof on the accommodation issue was on Little Forest. Little Forest also renewed its argument that the offer of employment tolled liability for back pay.[13]

The Court of Appeals *reversed* the rulings of the Commission and the lower court. The Court of Appeals found that the burden shifting analysis set forth in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), applied to the instant case.[14] The Court of Appeals further ruled that the Commission had failed to meet the *Wards Cove* burden. In addition, the Court of Appeals found that the offer of employment made by Little Forest was "substantially equivalent" to employment as an aide and, thus, that no back pay was owed after that offer was made.[15]

The Commission appealed the ruling of the Court of Appeals to the Ohio Supreme Court. The principal issue which was briefed and argued by the parties before the Ohio Supreme Court was whether the employer, or the complainant, had the burden of proof on the accommodation issue.[16]

The Ohio Supreme Court, in a departure from the issues which the parties had briefed and argued, reopened the issue of whether the privacy rights of the female patients could form the basis for the BFOQ

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[13] Brief of Little Forest at Appx. p. A115.
[14] Decision of Court of Appeals at Appx. p. A32.
[15] *Id.* at Appx. p. A36.
[16] Brief at OCRC at Appx. pp. A116, 117; Brief of Little Forest at Appx. p. A119.

defense. The Ohio Supreme Court also considered whether Little Forest had proved a factual basis for its belief that the female patients would object to care being provided by a male aide.[17]

The Ohio Supreme Court after briefing and argument, in a 4-3 decision, announced a new legal standard for the BFOQ defense which differed from the standards applied by other federal courts on the same issue. In this split decision, the Ohio Supreme Court (majority and dissent) relied exclusively on federal decisions interpreting Title VII.

On the issue of back pay liability, the Ohio Supreme Court ruled that the offer made by Little Forest was not "substantially equivalent" and that it did not toll back pay liability.[18]

On September 13, 1991, Little Forest filed a motion for reconsideration seeking a remand of the case to the Commission so that Little Forest would have an opportunity to put on evidence in conformity with the new substantive legal test articulated by the Court on the BFOQ defense.[19] The motion was overruled.[20]

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[17] *Little Forest*, 61 Ohio St. 3d at 614; Appx. p. A12, 13. These were issues on which the Commission had ruled *in favor of* Little Forest and consequently were not issues on appeal.

[18] *Little Forest*, 61 Ohio St. 3d at p. 615; Appx. pp. A13, 14.

[19] Memorandum in Support of Little Forest's Motion for Reconsideration at Appx. p. A121.

[20] Rehearing Entry of Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

ABSENT REVIEW AND REVERSAL, THIS CASE STANDS FOR THE PROPOSITION THAT GENDER, AS A BFOQ DEFENSE, MAY NOT BE BASED UPON CONSIDERATIONS OF THE RIGHTS OF PRIVACY OF FEMALE PATIENTS AT A NURSING HOME.

This is a case in which an employer has asserted that sex (female) is a bona fide occupational qualification for employment as a nurse's aide based upon the privacy rights of the female patients at the nursing home.

A substantial federal question is at issue here as to what the employer must prove in a BFOQ case where considerations of privacy are used to justify an employment decision based upon sex.

The applicability of gender as a BFOQ in a privacy case is suggested by *UAW v. Johnson Controls, Inc.*, _____ U.S. _____, 111 S. Ct. 1196 (1991). In that case, Justice White (concurring) stated that the majority's interpretation of the BFOQ standard "would seem to preclude considerations of privacy as a basis for sex-based discrimination . . . ."[21] In response, the majority stated that it had not addressed that issue and, in effect, reserved ruling for another day.[22]

The instant case presents the Court with an ideal opportunity to examine the BFOQ defense in the context of the privacy rights of residents of a health care institution. The factual scenario raised by the instant case has not been previously addressed by the Court and various state and federal courts disagree as to the substantive legal test to be applied in a BFOQ case

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[21] *Johnson Controls*, _____ U.S. at _____, 111 S. Ct. at 1214 at n.8.
[22] *Id.* at 1207 at n.4.

based upon considerations of privacy. This disharmony arises because of different employment considerations in the workplace.

There are two factual types of BFOQ cases where discrimination on the basis of sex is alleged. One involves decisions made by an employer based upon concerns of safety or ability to perform the requirements of the position.[23] In such a case, to establish a BFOQ defense, the employer must prove that it had reasonable cause to believe (*i.e.* a factual basis for believing) that all or substantially all persons of the gender rejected for employment would not be able to safely and efficiently perform the duties of the job or that it was impossible, or highly impractical, to make gender evaluations of fitness on an individualized basis. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).

The *Weeks* type of test does not fit a privacy case, such as this, because, in the instant case, the employer *concedes* that persons of both sexes can safely and efficiently perform the requirements of the position. Despite the fitness of both sexes to perform the work, the employer seeks to hire only one gender out of a deference to certain policy considerations. Obviously, this is a substantially different legal and factual scenario than *Weeks* contemplates.

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[23] *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (employer policy excludes women from employment as correction counselors in contact positions in all-male penitentiaries); *Weeks v. Southern Bell Telephone and Telegraphic Company*, 408 F.2d 228 (5th Cir. 1969) (policy excludes women from position of switchman due to physical requirements of the position); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (policy excludes males for employment as flight attendants).

The starting point for the BFOQ/privacy analysis is the Constitution of the United States which guarantees to all persons a right of privacy.[24] In a BFOQ/privacy case, the right of privacy is at odds with the rights of an applicant for employment to be considered without regard to his, or her, sex. A balance must be struck between these competing rights, one of which (privacy) arises under the Constitution and the other right (non-discrimination in employment) exists by virtue of an act of Congress.

Privacy is no stranger to federal and state legislation. Congress, in recent nursing home reform legislation, required nursing homes to protect and promote the right of privacy with regard to housing and medical treatment.[25] The law further states that nursing home residents have the right to "receive services with reasonable accommodation of individual needs and preferences . . . ."[26] Thus, Congress has required nursing homes, such as Little Forest, to respect patient preferences which may include a preference of female patients to be cared for by members of the same sex. (A comparable statute was enacted in Ohio as the "Patient Bill of Rights" which guarantees a right of privacy to all nursing home residents).[27]

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[24] *Roe v. Wade*, 410 U.S. 115 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[25] Omnibus Budget Reconciliation Act ("OBRA"), 42 U.S.C. §1396r(c)(1)(A)(iii).

[26] 42 U.S.C. §1396r(c)(1)(A)(v)(I).

[27] Ohio Revised Code §3721.13(A)(11); Ohio Administrative Code §5101.1:3-3-08(A)(19).

Several courts have ruled that an individual's right of privacy is a legitimate basis for a gender based decision under a BFOQ analysis.[28] In addition, the legislative history of Title VII of the Civil Rights Act of 1964[29] suggests that Congress was mindful of privacy issues which could arise in a health care institution when a male sought employment as a nurse's aide to provide intimate personal care to female residents.[30]

The Ohio Supreme Court (majority), interpreting Title VII cases, despite these longstanding concepts of privacy, has taken the contrary position and has ruled that the privacy rights of female patients in a nursing home are a mere customer preference which *may not* justify the gender based discrimination.[31] The majority opinion of the Ohio Supreme Court stated that the privacy interests of nursing home residents "must rest on grounds more substantial than merely the individual

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[28] *Jones v. Hinds General Hospital*, 666 F. Supp. 933 (S.D. Miss. 1987) (privacy rights of male patients permits employer to make sex-based decision to layoff female nurse assistants); *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) (privacy rights of clients or guests sufficient basis for BFOQ for position of washroom attendant); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982) (privacy rights of female patients in obstetrics and gynecology department of hospital sufficient to exclude men from the position of OB-GYN nurse); *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346 (N.D. Del. 1978) (privacy rights of nursing home residents sufficient to permit employer to hire only female nurse aides); *City of Philadelphia v. Pennsylvania Human Relations Commission*, 7 Pa. Comm. W. Ct. 500, 300 A.2d 97 (1973) (privacy rights of youth center inmates justifies hiring persons of the same sex as supervisory personnel).

[29] 42 U.S.C. §2000e-2.

[30] Representative Goodell stated: "There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse." 110 Cong. Rec. 2718 (1964).

[31] *Little Forest*, 61 Ohio St. 3d 607, 613 n.3 (1991); Appx. pp. A11, 12.

preference of business clients."[32] The Ohio Supreme Court cited the United States Supreme Court's ruling in the *Diaz*[33] case (where an airline refused to hire male flight attendants out of the belief that women were better able to meet the psychological needs of its passengers) as authority for its holding against Little Forest. This is a poor comparison at best.

Diaz falls in the first category of BFOQ cases where the employer's defense is based upon concerns of safety or ability to perform the requirements of the position. The legal test which is applied in *Diaz* has no application in the instant case where the employer concedes that men, and women, are equally capable of performing the requirements of the position.

Thus, a substantial federal issue which arises in the instant case is whether the privacy rights of female patients of a nursing home constitutes sufficient basis for a gender based decision to employ female nurse's aides exclusively. The substantive legal test which has been applied by other federal courts was rejected by the Ohio Supreme Court. Thus, a rule of law has arisen in the state of Ohio which is based upon a misinterpretation of federal cases and Title VII.

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[32] *Id.*

[33] *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

ABSENT REVIEW AND REVERSAL, THIS CASE STANDS FOR THE PROPOSITION THAT THE EMPLOYER HAS THE BURDEN OF PROOF THAT A REASONABLE ACCOMMODATION CANNOT BE MADE IN THE WORKPLACE TO MOOT THE NEED FOR A GENDER BASED DECISION.

In the instant case, the accommodation issue turned on whether the Ohio Civil Rights Commission had the burden to prove that the employer *could* accommodate a male aide in the nursing home or whether the employer had the burden to prove that it *could not* accommodate a male nurse's aide.

The Ohio Court of Appeals, citing this Court's decision in *Wards Cove,*[34] ruled that the Commission had the burden of proof and that the Commission had failed to meet its burden.[35] On appeal, the Ohio Supreme Court reversed that ruling and found that Little Forest had the burden of proof to show that it could not alter the workplace to allow employment of a male aide.[36]

This Court has not yet addressed the issue of which party has the burden on the accommodation issue in a BFOQ/privacy case, however, this Court has placed the burden on the complainant in other similar cases.

In *Furnco Construction,*[37] it was recognized that courts should be reluctant to mandate that employers adopt alternate employment practices in response to an

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[34] *Wards Cove Packing Company, Inc. v. Atonio,* 490 U.S. 642 (1989).
[35] Decision of Court of Appeals at Appx. pp. A32, 34.
[36] *Little Forest,* 61 Ohio St. 3d at 615; Appx. pp. A13, 14.
[37] *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978).

employment discrimination suit because "courts are generally less competent than employers to restructure business practices."[38] *Wards Cove* stands for the proposition that the burden of proving accommodation in a disparate impact case of discrimination is also on the complainant.

The Supreme Court of Ohio distinguished *Wards Cove* from the instant case on the theory that *Wards Cove* was a disparate impact case in which the employer asserted the "business necessity" defense whereas the instant case was one of overt discrimination where a BFOQ was argued. Regardless of whether the employment discrimination case involves claims of disparate impact or overt discrimination, the same burdens of proof should apply.

In *Wards Cove,* as here, the complaint argued that the employer's policy violated Title VII. Assuming that the employer has a legitimate basis for its policy (*i.e.* privacy rights of patients), the complainant may still prevail if he, or she, can prove that a reasonable accommodation can be made. The employer should not be required to prove a negative—that is, that a reasonable accommodation *cannot* be made.

This approach, which has been argued by Little Forest, is not only consistent with the dictates of *Furnco Construction* and *Wards Cove,* but it is also consistent with the burden shifting analysis in employment discrimination cases which was developed by this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The same shifting burden analysis should be applied in a BFOQ/privacy case. Once

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[38] *Id.* at 578.

the employer proves that privacy justifies the gender based decision, the complainant should have the burden to prove that a reasonable accommodation can be made.

In conclusion, this case presents a substantial federal question as to which party has the burden of persuasion on the accommodation issue in an employment discrimination suit where a gender based decision is the claimed discrimination and privacy is the moving force for the employers' disputed actions.

ABSENT REVIEW AND REVERSAL, THIS CASE STANDS FOR THE PROPOSITION THAT AN EMPLOYER'S OFFER OF EMPLOYMENT WILL NOT TOLL BACK PAY LIABILITY UNLESS THE OFFERED POSITION IS IN THE "CAREER TRACK" OF THE DISCRIMINATEE.

The ruling in *Ford Motor*[9] that an unconditional offer of substantially equivalent employment tolls the employer's liability for back pay in an employment discrimination case was misapplied by the Ohio Supreme Court. The Ohio Supreme Court ignored the undisputed facts that both the position offered and the position sought are in the bargaining unit represented by a union having a contract with Little Forest, and that the hours, working conditions and responsibilities were similar and the pay of the position offered was *higher.* Also, both positions required a measure of the same type of work.

Instead, the Ohio Supreme Court ruled that employment in the position offered (maintenance) in the nursing home was not relevant to "career development" and, therefore, it was not sufficiently equivalent so as to toll back pay liability.

The ruling of the Ohio Supreme Court is a departure from this Court's ruling in *Ford Motor.*

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[9] *Ford Motor Company v. EEOC,* 458 U.S. 219 (1981).

THERE ARE SUBSTANTIAL FEDERAL QUESTIONS ARISING AS TO THE BFOQ DEFENSE IN A PRIVACY CASE AND THE "SUBSTANTIALLY EQUIVALENT STANDARD" TO TOLL BACK PAY LIABILITY UNDER THE *FORD MOTOR* CASE.

The legal test to be applied in a BFOQ/privacy case is a substantial federal question. The BFOQ defense was enacted by Congress as part of the Civil Rights Act of 1964.[40] Although the instant case arose under Ohio's anti-discrimination statute,[41] Ohio has applied the same legal standards to determine whether a violation of its Civil Rights Act has occurred as have been applied in determining whether a violation of Title VII has occurred.[42] Moreover, the Ohio Supreme Court, in its ruling, relied upon federal law in articulating a substantive legal test for the BFOQ defense and then applying it to the facts of the instant case.[43]

Simply stated, federal and Ohio law with respect to employment discrimination are one and the same. If the Ohio Supreme Court has misconstrued the law as to either issue (*i.e.* the BFOQ defense or back pay liability), as counsel for Little Forest has argued, then this case should be heard by the United States Supreme Court so as to remedy the erroneous thinking of the state court.

Moreover, the Equal Employment Opportunity Commission ("EEOC") has promulgated regulations whereby charges of discrimination which are filed with

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[40] 42 U.S.C. §2000e-2(e)(1).

[41] Ohio Revised Chapter 4112.

[42] *Little Forest*, 61 Ohio St. 3d at 609; Appx. p. A5; *Plumbers & Steam Fitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192 (1981).

[43] The ruling of the Ohio Supreme Court is replete with citations to federal cases in which the BFOQ defense, under Title VII, was asserted.

the EEOC are referred to qualified deferral agencies on the state level such as the Ohio Civil Rights Commission, pursuant to a work sharing agreement.[44] It is the policy of the EEOC to give state fair employment practice agencies the opportunity to remedy alleged discrimination.[45] Once the state agency has made a finding as to whether "reasonable cause" exists to believe that discrimination occurred, the EEOC "shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law . . . ."[46] Regardless of whether the charge of discrimination is investigated by the EEOC or by a state fair employment practice agency, the EEOC may ultimately issue a finding in the case.

By virtue of the legislative framework under which charges of discrimination are investigated by state and federal fair employment practices agencies and given the Ohio Supreme Court's decision to apply the federal law of Title VII in cases arising under Ohio's anti-discrimination statute, there are substantial federal questions at issue here.

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[44] 29 C.F.R. §1601.13(a)(4).
[45] 29 C.F.R. §1601.13(a)(3)(i).
[46] 42 U.S.C. §2000e-5(b).

CONCLUSION

For the foregoing reasons, Petitioner, Little Forest Medical Center of Akron, requests that the Court issue a writ of certiorari and order that the instant case be argued to the Court on the merits.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided September 4, 1991)

No. 90-1052

THE SUPREME COURT OF OHIO

LITTLE FOREST MEDICAL CENTER OF AKRON,
Appellee and Cross-Appellant,

v.

OHIO CIVIL RIGHTS COMMISSION,
Appellant and Cross-Appellee.

[Cite as *Little Forest Medical Ctr. of Akron v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607.]

Civil Rights Commission—Complaint alleges facially discriminatory employment practices—Gender-specific hiring by employer—Requirements to prove that gender-specific hiring criteria constitute a bona fide occupational qualification.

Where, in an action brought pursuant to R.C. Chapter 4112 challenging alleged facially discriminatory employment practices, the employer seeks to justify gender-specific hiring criteria on the basis that such criteria constitute a bona fide occupational qualification, the burden is upon the employer to prove (1) that the gender-based criteria involve the essence of the employer's business, and (2) either that (a) all or substantially all members of the gender excluded by the employer are incapable of performing the job safely and efficiently, or (b) it is

impossible or impractical to make determinations of each applicant's qualifications in a nondiscriminatory manner.

APPEAL and CROSS-APPEAL from the Court of Appeals for Summit County, No. 14312.

On June 19, 1986, Rayferd Lawson ("complainant") submitted an employment application to defendant-appellee and cross-appellant, Little Forest Medical Center of Akron, to work as a nurse's aide or electrocardiogram technician at a wage rate of $5 per hour. Appellee is a skilled nursing facility serving two hundred fifty-six elderly patients, approximately eighty percent of whom are female. Its workforce includes ten registered nurses, forty licensed practical nurses and sixty-seven nurse's aides. All of the nurses's aides are female.

The duties of nurses's aides include some intimate personal contact with patients but other responsibilities merely entail feeding, housekeeping and providing mobility for residents. Following his application for this position, complainant was informed by the head nurse that he could not be hired. The sole reason for this decision was his gender.

On October 29, 1986, complainant filed a charge of gender discrimination with appellant and cross-appellee, Ohio Civil Rights Commission. On May 4, 1987, appellee offered complainant employment as a maintenance worker at a wage rate of $.70 an hour more than the nurse's aide position. Following investigation, a complaint was issued against appellee by appellant on July 9, 1987. On August 20, 1987, appellee filed a motion for summary judgment. On August 31, 1987, appellant filed a memorandum in opposition to appellee's motion

for summary judgment. The motion was denied by Hearing Examiner Debra J. Tucker on September 4, 1987. On September 10, 1987, the case was reassigned to Hearing Examiner Franklin A. Martens. A hearing was held on the complaint on October 14, 1987. At this time, the hearing examiner granted appellant's motion for leave to secure an expert witness. Shortly thereafter, appellee served upon appellant certain interrogatories requesting disclosure of the identity of expert witnesses and the nature of the testimony sought to be elicited from them. As of December 2, 1987, appellant had not responded to these interrogatories, and on that date, appellee filed a motion to compel discovery. A motion *in limine* was thereafter filed by appellee on December 23, 1987, seeking to exclude testimony by appellant's expert witness. On January 7, 1988, appellee's motion *in limine* and motion to compel discovery were denied. The hearing on the complaint continued on January 19, 1988. Following the presentation of additional evidence on May 24, 1988, the hearing examiner issued findings of fact and conclusions of law on August 15, 1988. The hearing examiner recommended that the commission issue a cease and desist order to appellee, order appellee to offer employment to complainant as a nurse's aide, order back pay to complainant from June 17, 1986 to the date of the offer of employment, and order appellee to refrain from taking any action to discipline, demote or discharge complainant within one year of his employment without notifying the commission within ten days thereof and providing the reasons therefor.

On October 6, 1988, these recommendations were adopted by the commission. Appellee filed a complaint and petition for review of the final order of the commission with the Summit County Court of Common Pleas on October 31, 1988. On September 27, 1989, the

common pleas court affirmed the decision of the commission. Appellee filed a notice of appeal of this determination with the Court of Appeals for Summit County on October 19, 1989. On April 11, 1990, the court of appeals affirmed in part and reversed in part the decision of the common pleas court. The appellee court concluded that the commission did not err in overruling appellee's motion *in limine*, motion to compel discovery and motion for summary judgment. However, the court did conclude appellant erred when it imposed a burden on appellee to prove that it could not rearrange its work assignments to eliminate the privacy problem. The court held that the burden of proof in these cases rests solely with appellant. Moreover, the appellate court concluded that the offer by appellee to complainant of employment as a maintenance man tolled the accrual of back pay because the position constituted substantially similar employment to that which was sought. On May 10, 1990, appellant filed an appeal of the court of appeals' decision. On May 21, 1990, appellee filed a cross-appeal.

The cause is now before this court pursuant to the allowance of a motion and cross-motion to certify the record.

Joondeph & Shaffer, David H. Shaffer, and *Michael J. Spetrino,* for appellee and cross-appellant.

Lee I. Fisher, Attorney General, and *Gregory J. Vincent,* for appellant and cross-appellee.

Isaac, Brant, Ledman & Becker, David H. Meade and *Barbara L. Kozar,* urging reversal for *amici curiae,* Ohio Chapter of the National Organization for Women, Committee Against Sexual Harassment, National Association of the Physically Handicapped, Courage, Inc., and the Ohio Employment Lawyers Association.

SWEENEY, *J.*

I

The present action was initiated pursuant to R.C. Chapter 4112. R.C. 4112.02(A) provides as follows:

"It shall be an unlawful discriminatory practice:

"(A) *For any employer, because of the* race, color, religion, *sex,* national origin, handicap, age, or ancestry *of any person,* to discharge without just cause, *to refuse to hire,* or otherwise to discriminate against *that person* with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." (Emphasis added.)

In *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196, 20 O.O.3d 200, 202-203, 421 N.E.2d 128, 131, this court concluded that the evidentiary standards applicable to a determination regarding a violation of Title VII of the Civil Rights Act of 1964 were likewise operable with respect to ascertaining whether a violation of R.C. Chapter 4112 has occurred. In this regard the court observed:

" 'Reliable, probative, and substantial evidence' is not defined in the statute [*i.e.,* R.C. 4112.05(G), which establishes the evidentiary standards for finding an unlawful discriminatory practice under R.C. Chapter 4112]. In previous cases, however, we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e *et seq.*, Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chaper 4112. *Republic Steel v. Ohio Civil Rights Comm.* (1975), 44 Ohio St.2d 178, 339 N.E.2d 658; *Weiner v. Cuyahoga Community College District* (1969), 19 Ohio St.2d 35, 48 O.O.2d 48, 249 N.E.2d 907. Cf. *Youngblood v. Dalzell* (1973), 6 EPD

para. 8719 (S.D. Ohio, W.D.). Thus, 'reliable, probative, and substantial evidence' in an employment discrimination case brought pursuant to R.C. Chapter 4112 means evidence sufficient to support a finding of discrimination under Title VII."

Thus, the requisite burdens of proof regarding particular evidentiary issues established by the federal courts are relevant in determining whether there exists reliable, probative and substantial evidence of discrimination in violation of R.C. Chapter 4112.

The evidentiary issues and the respective burdens of the parties vary according to the nature of the discriminatory conduct in question. The appropriate standard is therefore dependent upon the criteria utilized by the employer to arrive at its employment decision. Where facially discriminatory employment criteria are applied, such practices constitute "disparate treatment" of a person entitled to protection under the law. Where facially neutral criteria are applied and the application of the criteria results in discriminatory consequences to members of the protected class, such practices are said to produce a "disparate impact" upon the affected individuals.

While the ultimate determination in both species of cases inevitably concerns the existence or nonexistence of unlawful employment discrimination, the legal inquiry is markedly different in several important respects. At the outset, it must be emphasized that the plaintiff bears the burden of establishing the existence of discriminatory motive only in cases involving disparate treatment. See *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 245-246, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268, 285. In a disparate impact case, discriminatory motive is irrelevant. *Watson v. Fort Worth Bank & Trust*

(1988), 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827. In the latter type of case, the plaintiff may prevail if she establishes that the employer has engaged in a specific practice which has excluded from employment members of a protected class. *Id.* at 994, 108 S.Ct. at 2788-2789, 101 L.Ed.2d at 845. This demonstration may be made through statistical evidence revealing a discrepancy between the composition of the workforce at issue and the composition of the pool of candidates for the specific employment in the relevant labor market. *Id.* at 997, 108 S.Ct. at 2791, 101 L.Ed.2d at 846.

Once the plaintiff has established a prima facie case of disparate impact, the employer has the burden of producing evidence of a "business justification" for its "neutral" hiring criteria. *Wards Cove Packing Co., Inc. v. Atonio* (1989), 490 U.S. 642, 659, 102 S.Ct. 2115, 2126, 104 L.Ed.2d 733, 753. The burden of persuasion remains with the plaintiff to show that the challenged criteria fail to serve, in a significant way, the employer's legitimate employment goals. *Id.* at 659-660, 109 S.Ct. at 2126, 104 L.Ed.2d at 753-754. In describing the "business justification" standard, the court in *Wards Cove, supra,* remarked:

"*** The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be

almost impossible for most employers to meet, and would result in a host of evils ***." *Id.* at 659, 109 S.Ct. at 2126, 104 L.Ed.2d at 752-753.

In contrast, where facially discriminatory hiring criteria are utilized by the employer, as in the present case, a different analysis is undertaken. Under such circumstances, the common-law "business justification" standard is inapplicable. See *Internatl. Union, United Auto., Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991), 499 U.S. _____, 111 S.Ct. 1196, 113 L.Ed.2d 158. Instead, the only defense to facially discriminatory employment practices is that afforded under Section 703(e)(1) of the Civil Rights Act of 1964, as amended, Section 2000e-2(e), Title 42, U.S.Code. This section provides:

"(e) Notwithstanding any other provision of this subchapter, *** *it shall not be an unlawful employment practice for an employer to hire and employ employees* *** *on the basis of his* religion, *sex*, or national origin in those certain instances *where* religion, *sex*, or national origin *is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise* ***." (Emphasis added.)

At the outset, it must be recognized that this statutory provision, inasmuch as it constitutes an exception to the public policy embodied in the Act as a whole to eliminate discrimination, is to be construed narrowly by the courts. See *Dothard v. Rawlinson* (1977), 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786, 800; *Western Air Lines, Inc. v. Criswell* (1985), 472 U.S. 400, 412, 105 S.Ct. 2743, 2752-2753, 86 L.Ed.2d 321, 322, (construing a similar provision in the Age Discrimination in Employment Act of 1967, Section 621 *et seq.*, Title 29, U.S.Code). Moreover, it has been observed that the bona

fide occupational qualification ("BFOQ") exception is in the nature of an affirmative defense with respect to which the employer bears the burden of proof. 1 Sullivan, Zimmer & Richards, Employment Discrimination (1988) 105, Section 3.5.

The BFOQ defense to a facially discriminatory employment policy requires the employer to initially demonstrate that the hiring criteria utilized involve the "essence" of its business. *Dothard, supra,* 433 U.S. at 333, 97 S.Ct. at 2729, 53 L.Ed.2d at 800; *Western Air Lines, supra,* 472 U.S. at 413, 105 S.Ct. at 2751, 86 L.Ed.2d at 333; 1 Sullivan, Zimmer & Richards, Employment Discrimination, *supra,* at 111, Section 3.6.2. The "essence of the business" requirement is not satisfied merely because the facially discriminatory criteria further some peripheral function of the employer. In the context of gender discrimination, the Fifth Circuit Court of Appeals described the BFOQ defense as follows:

"We begin with the proposition that the use of the word 'necessary' in section 703(e) requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis *sic.*) *Diaz v. Pan American World Airways, Inc.* (C.A.5, 1971), 442 F.2d 385, 388.

Moreover, the employer asserting a BFOQ defense must also demonstrate that it had a factual basis for believing that all or substantially all members of the excluded gender would be unable to perform safely and efficiently the duties of the job involved. *Johnson Controls, supra,* 499 U.S. at _____-_____, 111 S.Ct. at 1207-1208, 113 L.Ed.2d at 178-179, or that it is impossible or highly impractical to differentiate the

qualified from the unqualified in a nondiscriminatory manner. *Weeks v. Southern Bell Tel. & Tel. Co.* (C.A.5, 1969), 408 F.2d 228, 235; 1 Sullivan, Zimmer & Richards, Employment Discrimination, *supra*, at 119; Rossein, Employment Discrimination: Law and Litigation (1990) 2-31, Section 2.2(11).

It is the contention of appellee that it may utilize the less demanding "business justification" standard announced in *Wards Cove v Atonio, supra.*[1] However, as seen in *Johnson Controls, supra*, this test is unavailable where the employer applies facially discriminatory hiring criteria. See, also, Rossein, *supra*, at 2-30.[2] Instead, the more stringent requirements of the BFOQ defense

[1] It is certainly not surprising that appellee would seek the application of standards embodied in the business justification standard. That standard merely requires that the employer produce evidence that the challenged employment practice "serves, in a significant way, the legitimate employment goals of the employer. ***" *Wards Cove, supra*, 490 U.S. at 659, 109 S.Ct. at 2125-2126, 104 L.Ed.2d at 753. As noted in *Wards Cove*, "*** there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business ***." *Id.* at 659, 109 S.Ct. at 2126, 104 L.Ed.2d at 753. In contrast, the BFOQ defense requires that a discriminatory practice concern the "essence" of the business. *Dothard, supra.* Moreover, under the "business justification" standard, the plaintiff is required to establish alternative nondiscriminatory methods of accomplishing the legitimate business goals of the employer. *Wards Cove, supra*, 490 U.S. at 660, 109 S.Ct. at 2126, 104 L.Ed.2d at 753. Under the BFOQ defense, the employer is required to demonstrate the unavailability of alternate nondiscriminatory means of selecting individuals capable of performing functions essential to the business. *Weeks, supra.*

[2] The discussion herein of the *Wards Cove* business justification standard is limited to our consideration of its elements, our observations concerning how these elements differ from the more stringent requirements of the BFOQ defense and our further determination that the *Wards Cove* standard is inapplicable to actions predicated upon "disparate treatment." This opinion should not be interpreted as endorsing the application of the *Wards Cove* analysis to actions arising under R.C. Chapter 4112 predicated upon "disparate impact."

obtain. We therefore conclude that where, in an action brought pursuant to R.C. Chapter 4112 challenging alleged facially discriminatory employment practices, the employer seeks to justify gender-specific hiring criteria on the basis that such criteria constitute a bona fide occupational qualification, the burden is upon the employer to prove (1) that the gender-based criteria involve the essence of the employer's business, and (2) either that (a) all or substantially all members of the gender excluded by the employer are incapable of performing the job safely and efficiently, or (b) it is impossible or impractical to make determinations of each applicant's qualifications in a nondiscriminatory manner.

Applying the foregoing standard to the case at bar, it is apparent that appellee has failed to establish the affirmative defense of a bona fide occupational qualification. Inasmuch as appellee concedes that its gender-based criteria are not predicated upon a valid factual determination that males are incapable of performing the employment responsibilities of a nurse's aide, it bears the burden of establishing that (1) the privacy interests of its patients constitute a proper factual basis for restricting employment of nurse's aides to females[3] and (2) such privacy interest could not be

[3]This privacy interest must rest on grounds more substantial than merely the individual preferences of business clients. In this regard, the court in *Diaz, supra,* observed:

"*** While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers." *Id.* at 389.

(Footnote continued on following page.)

furthered in a nondiscriminatory manner. Appellee has satisfied neither aspect of the test. While it may be conceded for the sake of argument that *some* female residents may object to the performance of intimate personal services by male nurse's aides, this would be equally true of the performance of such services by female nurse's aides for *some* of the *male* residents at appellee's facility.

(Footnote continued from preceding page.)

This is not to say that the privacy interests of patients could not be so intertwined with the business goals of an enterprise that the burden of proving the BFOQ affirmative defense could not be satisfied. See *Fesel v. Masonic Home of Delaware, Inc.* (D.Del.1978), 447 F.Supp. 1346. However, *Fesel* is factually distinguishable from the case at bar. *Fesel* involved a nursing care facility serving thirty residents of which twenty-one were female and eight were male. In contrast, the facility operated by appellee is structured to accommodate two hundred fifty-six patients. The nursing home in *Fesel* employed six or eight nurse's aides while appellee employs sixty-seven. The sheer size of the facility operated by appellee must be assumed to afford greater flexibility in work assignments. Inasmuch as appellee bears the burden of establishing the impracticability of adjusting work assignments to eliminate the necessity for its discriminatory practice, such burden will necessarily be more difficult where the facility offers greater options for accomplishing its business goals. *Fesel* is also distinguishable from the case at bar in its treatment of the alleged preferences of the male residents of the Masonic Home. In footnote five of the opinion, the federal district court remarked:

"The question of the preferences of the male guests at the Home was not explored at trial. However, since the male guests do presently accept care from female nurse's aides, there does not appear to be any problem of nonconsenting male guests." *Id.* at 1353.

We are unwilling to engage in any such assumption in the case *sub judice*. To do so would be inconsistent with the requirement which underlies the BFOQ defense that the defendant bear the burden of establishing every element thereof. The BFOQ defense requires the employer to demonstrate that the justification for its discriminatory practice is, in fact, legitimate. Absent evidence that the privacy interests of male residents have been accommodated by the present practice of having their personal needs met by female aides, the burden of proof on the issue has not been satisfied.

Appellee has therefore failed to establish a factual basis for its initial contention that the privacy interests of its patients are currently being served. If, in fact, the privacy interests of its patients are paramount, how does appellee explain its failure to take these interests into account with respect to the treatment of the male residents of its facility? The BFOQ defense demands more than the mere assumption that the avowed justification for appellee's discriminatory practice (*i.e.*, the privacy interests of the patients) is legitimate when its male residents have no option to choose nursing care by a member of their own gender. We are unwilling to assume that all or some of the male residents, if asked, would nevertheless opt for treatment by female nurse's aides. Certainly appellee has adduced no evidence to support this conclusion.

Moreover, even if we were to indulge in the assumption that the privacy interests of its patients constitute a legitimate goal and that this goal is currently served, appellee has failed to demonstrate that the goal could not be furthered in a nondiscriminatory fashion (*i.e.*, assigning male nurse's aides to male residents and non-objecting female residents and female nurse's aides to female and non-objecting male residents).

In reversing the Ohio Civil Rights Commission and the common pleas court, the appellate court applied the *Wards Cove* "business justification" standard. As mentioned previously, this test applies only to gender-neutral policies which produce a disparate impact upon a particular gender. In the present case, the more stringent BFOQ statutory defense is applicable to appellee's gender-based classification. Inasmuch as appellee does not dispute that male nurse's aides are *capable* of performing the responsibilities entailed in such

employment, it must establish that the hiring of male nurse's aides not only would undermine the essence of the job involved but that it could not further these goals in a nondiscriminatory manner. The court of appeals, therefore, applied the wrong standard on review and must be reversed on this basis.

II

The court of appeals also concluded that the offer by appellee to complainant of employment as a maintenance man tolled the accrual of back pay because such employment was "substantially equivalent" to the position he was denied, citing *Ford Motor Co. v. Equal Emp. Opportunity Comm.* (1982), 458 U.S. 219, 232, 102 S.Ct. 3057, 3066, 73 L.Ed.2d 721, 732-733. The appellate court based its judgment not only on the view that the maintenance job was substantially equivalent, but also that the pay for that job was higher than for a nurse's aide. This analysis is erroneous. The appellate court cited no evidence or reasoning in support of its finding of substantially similar employment. The goal of the complainant was to pursue a career in the health care field. While certainly there are aspects of employment as a nurse's aide which may appear unpleasant, the job is relevant to *career development* in the health care industry. The same cannot be said of employment as a janitor. An extra $.70 per hour does not alter this fact. Accordingly, the holding of the court of appeals that the two positions constituted substantially similar employment must be reversed.

III

Appellee filed a cross-appeal challenging the denial of its motion for summary judgment and the subsequent affirmance thereof by the common pleas court and court

of appeal. It is the contention of appellee that the denial of the motion was erroneous because it had establshed therein that the gender-based classification was justified and that no nondiscriminatory method of accomplishing its business objectives was possible. Appellant did not file any memorandum contra which included supporting affidavits.

Civ. R. 56(C) governs this issue. It provides:

"Motion and proceedings thereon. *** *Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.* No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. ***" (Emphasis added.)

Despite the absence of evidentiary materials adverse to the motion for summary judgment, it is beyond question that appellee was not entitled to judgment as a matter of law. Inasmuch as the *law* requires appellee to demonstrate that its gender-based classification involves the essence of the business and that this goal cannot be accomplished in a nondiscriminatory manner, it must appear from the motion that appellee had established both of these factors.

Appellee claims that the business interest served by its gender based classification is the privacy rights of its patients. However, the undisputed facts indicate that there are approximately sixty male patients whose privacy rights have apparently not been considered by appellee as demonstrated by appellee's exclusive employment of female nurse's aides. There is nothing in the record to indicate that *all* of these residents, if given the choice, would opt for female aides. Given the state of the record when the motion was made, it was unnecessary to determine whether such goal could be furthered in a nondiscriminatory fashion since it had not been demonstrated that it had been "furthered" by appellee's discriminatory method. There was thus no factual basis for this alleged business interest.

We therefore affirm the decisions of the court below affirming the denial of appellee's motion for summary judgment.

IV

Appellee further contends on cross-appeal that the hearing examiner committed reversible error by refusing to compel discovery when appellee's interrogatories were not answered and by failing to grant its motion *in limine* to exclude the testimony of the expert witness whose identity was the subject to which the interrogatories were directed. This argument is without merit. As an initial matter, the hearing examiner concluded that the information sought through the interrogatories had been provided by the opposing party. Appellee has failed to demonstrate that this determination was without foundation. Second, rulings on such motions are matters committed to the sound discretion of the administrative tribunal. They will not be reversed absent an abuse of discretion. There was no abuse of discretion present.

The judgment of the court of appeals is therefore affirmed in part, reversed in part, and the cause is remanded to the trial court for reinstatement of judgment.

Judgment affirmed in part,
reversed in part
and cause remanded.

DOUGLAS, H. BROWN and RESNICK, *JJ.*, concur.

MOYER, *C.J.*, HOLMES and WRIGHT, *JJ.*, dissent.

HOLMES, *J.*, dissenting. The proper application of employment discrimination law as enumerated by the federal courts in Title VII actions, where an employer defends by raising the privacy interests of its customers as the basis for a bona fide occupational qualification ("BFOQ") defense, should reasonably result in the affirmance of the judgment of the court of appeals here.

The particularized facts of this matter are that Little Forest Medical Center operates a skilled nursing facility providing health care services to some two hundred fifty-six elderly patients, eighty percent of whom are female. The majority of the patients require "total care," meaning that these patients require assistance with all activities of daily living, including bathing and dressing. At the time of hearing, only twelve patients were ambulatory and only four patients were able to bathe themselves. In addition, a very high number of the patients were incontinent. Aides provide constant personal service to the patients, which includes bathing the patients, assisting in the patient's use of bedpans, providing bowel and bladder training for patients, and giving enemas. An attending physician at Little Forest testified that the female patients would refuse to accept

care from a male aide. Based upon these facts Little Forest reasonably concluded that gender (female) was a BFOQ for employment at Little Forest as a nurse's aide for the protection of the privacy of its patients.

Congress has specifically provided for the BFOQ as a defense to actions brought for employment discrimination pursuant to the Civil Rights Act of 1964, as amended. Under Section 703(e)(1) of the Act, Section 2000e-2(e), Title 42, U.S.Code, "*** it shall not be an unlawful employment practice for an employer to hire and employ employees *** on the basis of his *** sex *** in those certain instances where *** sex *** is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ***." The United States Supreme Court, in reference to this statutory defense, stated, "*** [t]he existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to *** [Title VII]." *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 242, 109 S.Ct. 1775, 1786, 104 L.Ed.2d 268, 283.

Certainly, there should be no argument that the BFOQ defense may be based upon the employer's concern for the privacy rights of its patients. This conclusion certainly would be entirely consistent with the Ohio statute known as the "Patient Bill of Rights" which mandates that nursing homes protect the privacy of their residents. R.C. 3721.13(A)(11).

Within its brief, Little Forest relies upon the BFOQ defense, not the "business justification" standard as stated by the majority. Further, the appellee recognizes in its argument here that the BFOQ is an affirmative

defense and that, as the employer, Little Forest has the burden of proving that the essence of its business operation would be undermined unless it could hire members of one sex exclusively. See *Dothard v. Rawlinson* (1977), 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786.

The appellee presented all the appropriate evidence before the Ohio Civil Rights Commission to properly support its BFOQ defense that its policy of hiring only female nurse's aides was to protect its patients' privacy rights. The commission's findings of fact and conclusions of law so stated:

"*** Respondent [Little Forest] proved there was a factual basis for its belief that some female patients would object to being viewed in the nude or having their genitals touched by males. The testimony of the physician who treated many of Respondent's female patients and the nurses who cared for them supported this conclusion. The Commission did not present any evidence to the contrary."

Here, Little Forest appears to be aware that its hiring practice limiting aide employees to females is "overt discrimination" as described in *Dothard, supra*, at 332, 97 S.Ct. at 2728, 53 L.Ed.2d at 799, and also recognizes that it must bear the burden of establishing that its otherwise unlawful classification falls within the BFOQ exception.

Where privacy invasions of guests are the basis of the BFOQ defense, rather than the physical ability of one sex to perform required job responsibilities, there are different considerations of proof needed by the employer. Accordingly, in *Fesel v. Masonic Home of Delaware, Inc.* (D.Del.1978), 447 F.Supp. 1346, it was stated:

"*** [W]hen an employer defends a sex discrimination action by raising the privacy interests of its customers as the basis for a bfoq defense, that employer must prove not only that it had a factual basis for believing that the hiring of any members of one sex would directly undermine the essence of the job involved or the employer's business, but also that it could not assign job responsibilities selectively in such a way that there would be minimal clash between the privacy interests of the customers and the non-discrimination principle of Title VII." *Id.* at 1351.

In *Harden v. Dayton Human Rehabilitation Ctr.* (S.D.Ohio 1981), 520 F.Supp. 769, affirmed (C.A.6, 1985), 779 F.2d 50, the court held that the employer had not sustained its affirmative defense of BFOQ because it had failed to establish either that the hiring of women guards would undermine the essence of the employer's operations, or that job responsibilities could not be assigned in order to minimize the anticipated conflicts.

Here, the privacy concerns of the employer relative to its elderly guests should be given a significantly higher degree of attention and consideration by the Civil Rights Commission, as well as by the reviewing courts, than would be given the privacy concerns of management for inmates in a prison facility. As to these privacy concerns, Little Forest presented evidence of the intimate care and attention that was needed by a majority of its female patients, and that they would be unwilling to accept the care from a male aide.

In support of its position that job responsibilities could not reasonably be reassigned in order to minimize conflicts, Little Forest adduced evidence that it could not reasonably accommodate a male aide without upsetting its whole staff routine, and without incurring additional

business costs. Evidence was offered to show that it could not rearrange its assignment of aides without creating an additional, and unnecessary, position. The administrator of Little Forest testified that there are male and female residents on each floor of the facility, that an aide is assigned to a section or block of rooms on each floor, and that each aide provides intimate personal care for the patients in the assigned section.

It was also demonstrated that the registered nurses and the licensed practical nurses are assigned to a block of rooms in the same manner as the aides. This system of assignment is intended to make the most efficient use of the employees' time. If an aide does not report to work as scheduled, then the group of rooms assigned to the remaining aides is adjusted according to a pre-designed schedule and each aide knows the rooms to which she is assigned.

The administrator at Little Forest also testified that if a male aide were hired to provide personal care for the female residents who did not object and for the limited number of male residents, then the male aide would be an extra employee and such an employee would be surplusage. It certainly cannot be the intent of this federal Act to require employers to incur additional needless expense to accommodate a male aide, nor can I believe it to be the meaning of this law to require employers to deliberately mismanage their operations. See *Norwood v. Dale Maintenance System, Inc.* (N.D.Ill.1984), 590 F.Supp. 1410.

Based upon all the aforestated evidence submitted by Little Forest, it sustained its burden of supporting its BFOQ defense based upon the privacy interests of its patients.

The commission offered the testimony of one Dr. May Wykle, a professor of psychiatric and gerontological nursing, who had never visited Little Forest and was not personally familiar with the physical layout of Little Forest. She testified that in her opinion any nursing facility such as Little Forest could assign a male nurse's aide to serve only male patients without diminishing the quality of patient care, or could assign the male aide selectively to those female patients who did not object to such assignment.

The court of appeals ruled in favor of Little Forest upon the basis, *inter alia*, that the commission's decision was not supported by reliable, probative and substantial evidence. I agree with the court of appeals.

Little Forest sets forth in its cross-appeal that the court of appeals should have sustained the assignments of error claiming procedural errors committed by the commission hearing officer concerning the testimony of the commission's expert witness. I am in agreement with the cross-appellant in this regard. The hearing officer of the commission abused his discretion in not granting Little Forest's motions relating to discovery. The history of the case in this regard is as follows. After the testimony and evidence of Little Forest were presented to the hearing officer, counsel for the commission requested a postponement in order to secure an expert witness to rebut the employer's case. The hearing officer granted a sixty-day postponement over Little Forest's objections.

Shortly thereafter, Little Forest served the commission's counsel with interrogatories which sought the identity of the expert witness to be used by the commission and the subject matter of the testimony to

be offered. The commission did not answer the interrogatories. On December 2, 1987, Little Forest moved for an order compelling answers to interrogatories. The commission ignored the motion but its counsel informally advised counsel for appellee, in a telephone conference, that the commission intended to call a person identified as Dr. May Louise Wykle as its rebuttal witness. Counsel for the commission did not, however, state the subject matter of the witness's anticipated testimony.

On December 23, 1987, Little Forest filed a motion *in limine* to prevent Dr. Wykle from testifying as a sanction against the commission for its refusal to answer interrogatories. The commission did not respond to the motion *in limine*. The hearing officer overruled the motion *in limine* and the motion to compel on January 7, 1988. When these efforts to obtain discovery regarding the commission's rebuttal witness failed, counsel for Little Forest subpoenaed Dr. Wykle for a deposition. The commission moved to quash the subpoena the same day that it was served. The following day, January 12, 1988, the hearing officer granted the commission's motion to quash before counsel for Little Forest had an opportunity to respond. Little Forest then moved for a postponement of the hearing to permit its counsel to depose the witness but that motion was denied.

Thereafter, the expert witness (Dr. Wykle) testified over objection, the record was closed, briefs were filed, and the hearing officer issued a report recommending a finding against Little Forest. Little Forest filed objections to the report. These objections were overruled by the commission and the recommended order was adopted verbatim.

The actions of the hearing officer in denying all of Little Forest's discovery motions were unreasonable and an abuse of discretion. Accordingly, the testimony of the commission's expert witness should not have been considered by the commission. The court of appeals should have sustained this assignment of error of Little Forest.

Additionally, I would affirm the judgment of the court of appeals relative to the tolling of the employer's liability for back pay when comparable work had been offered the complainant. On May 4, 1987, Little Forest offered Rayferd Lawson full-time employment in the maintenance department at the nursing home. If Lawson had accepted the offer, his wage rate would have been $.70 an hour more than is paid to an aide. In all other respects, it appears that the terms and conditions of his employment would have been identical to that of an aide. This offer of employment was refused by Lawson.

The court of appeals correctly ruled that Lawson's claim for back pay was tolled because he refused an unconditional offer of substantially equivalent employment. *Ford Motor Co. v. Equal Emp. Opportunity Comm.* (1982), 458 U.S. 219, 232, 102 S.Ct. 3057, 3065-3066, 73 L.Ed.2d 721, 732-733. The court of appeals agreed with Little Forest, and with the other courts which have ruled on this issue, that the position offered need not be identical but that it only needs to be "substantially equivalent." *Equal Emp. Opportunity Comm. v. Exxon Shipping Co.* (C.A.5, 1984), 745 F.2d 967, 977; *Rasimas v. Michigan Dept. of Mental Health* (C.A.6, 1983), 714 F.2d 614, certiorari denied (1984), 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537. Contrary to the argument made by appellant, the court of appeals did not reweigh the evidence but simply ruled that the commission erred, as

a matter of law, when it applied the wrong legal standard in evaluating the employer's unconditional offer of employment.

In the instant case, the position of employment offered to Lawson was substantially equivalent to the position of aide because the hours, working conditions, responsibilities and pay were similar. In certain respects, both positions required a measure of the same type of work because maintenance employees and aides both perform quasi-janitorial duties. If there is any doubt about the sufficiency of the offer of employment, that question is answered in Lawson's own hand when he completed an application for employment and stated that one of the types of employment which he sought was "electrical maintenance." Here, he was given work in the only type of "maintenance" done at the home.

Based upon all the foregoing, I would affirm the judgment of the court of appeals.

MOYER, *C.J.*, and WRIGHT, *J.*, concur in the foregoing dissenting opinion.

WRIGHT, *J.*, dissenting. I would affirm the well-reasoned decision of the court of appeals. Results such as this one offend the average citizen's sensible recognition of what is right and what makes common sense. I suggest that if one of us (including the author) mandated that one of his or her older female relatives be manhandled by a male nurse, a spirited effort would be made to consign that judge to the nether regions.

The curious thing about the majority opinion is that the syllabus law is in large measure sound.[4] However, the majority completely misses the mark in applying the ruling case law to the record before us. Having conceded that we should be guided by federal law, the majority cites the BFOQ exception to gender discrimination provided by Section 703(e)(1) of the Civil Rights Act of 1964:

"(e) Notwithstanding any other provision of this subchapter, *** it shall *not* be an unlawful employment practice for an employer to hire and employ employees *** on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise* ***" (Emphasis added.) Section 2000e-2(e), Title 42, U.S.Code.

Having mouthed a test which was met by an *uncontested* motion for summary judgment,[5] the

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[4] The weakness in the syllabus is that it never mentions the federal law upon which this case is decided, specifically the bona fide occupational qualification ("BFOQ") defense to a Title VII action. Section 2000e-2(e), Title 42, U.S.Code.

[5] We recently approved and adopted *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, wherein, at paragraph three of the syllabus, we held: "A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial." While neither the commission or the courts below had the benefit of that important statement of the law, the court of appeals' opinion should be affirmed on this basis alone.

Little Forest bore the burden of establishing the BFOQ defense at trial. In its motion for summary judgment, Little Forest provided affidavits establishing the BFOQ defense, thereby shifting the burden of production. In response to this motion the commission produced no evidence. Consequently, Little Forest was entitled to judgment as a matter of law.

majority cites *Internatl. Union, United Auto., Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991), 499 U.S. _____, 111 S.Ct. 1196, 113 L.Ed.2d 158, which has exactly nothing to do with male nurses touching the "personal parts" of elderly female patients.

The applicability of the BFOQ should be clear enough to even one untrained in the law. The court of appeals held that the record demonstrates the patients at Little Forest require female attendants. I agree. In my view the BFOQ was established. Since all this is lost on the majority, I dissent.[6]

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[6] I cannot neglect to comment on the hearing examiner's failure to grant the hospital's motion *in limine* after appellant's complete disregard for the Ohio Rules of Civil Procedure. The majority simply passes this issue off by indicating the hearing examiner "concluded that the information *** had been provided by the opposing party." We should limit ourselves to the record, which is devoid of any evidence to support such a conclusion—no testimony, no affidavits and not even a professional statement by appellant's counsel. This was clear-cut error, albeit harmless given a proper disposition of the case, *not* an exercise of "discretion" on the part of the trier of fact.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Filed September 4, 1991)

Case No. 90-1052

THE SUPREME COURT OF OHIO

LITTLE FOREST MEDICAL CENTER OF AKRON,
Appellee/Cross-Appellant,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants/Cross-Appellees

APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS

JUDGMENT ENTRY

This cause, here on appeal and cross-appeal from the Court of Appeals for Summit County, was considered in the manner precribed by law. On consideration thereof, the judgment of the court of appeals is affirmed in part and reversed in part and the cause is remanded to the trial court for reinstatement of judgment consistent with the opinion rendered herein.

It is further ordered that the appellant/cross-appellee recover from the appellee/cross-appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Summit County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

(Court of Appeals No. 14312)

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Dated September 4, 1991)

Case No. 90-1052

THE SUPREME COURT OF OHIO

LITTLE FOREST MEDICAL CENTER OF AKRON,
Appellee/Cross-Appellant,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants/Cross-Appellees.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Summit, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed in part and reversed in part and the cause is remanded to the trial court for reinstatement of judgment consistent with the opinion rendered herein.

COSTS:

Motion Fee, $40.00, paid by Attorney General of Ohio.

Motion Fee, $40.00, paid by Joondeph & Shaffer.

(Court of Appeals No. 14312)

/s/ THOMAS J. MOYER
Chief Justice

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO

(Dated April 11, 1990)

C.A. No. 14312

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LITTLE FOREST MEDICAL CENTER OF AKRON,
Plaintiff-Appellant,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Defendants-Appellees.

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, COUNTY OF SUMMIT, OHIO
CASE NO. CV 88 10 3514

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CIRIGLIANO, *J.* Little Forest Medical Center (Little Forest) operates a 256 bed skilled nursing facility. Little Forest's patients are primarily elderly and non-ambulatory. Eighty percent are female. Most of their extensive health and personal needs are cared for by an all-female staff of ten registered nurses, forty licensed practical nurses and sixty-seven nurse's aides. The staff is assigned to cover rooms which are adjacent to one another so as to make efficient and cost-effective use of staff time.

On June 19, 1986, Rayferd Lawson applied to Little Forest for work as a "nurse's assistant", an "EKG tech" or to do "electrical maintenance" with hopes of compensation at around five dollars ($5.00) per hour. Because of his education and training, Lawson testified that he wanted to work in the medical field either as a nurse's aide or in some comparable position. However, Lawson testified that the head nurse told him he was ineligible for employment as a nurse's aide because he was a man. Little Forest told Lawson that the female patients would object.

Lawson filed a charge of discrimination with the Ohio Civil Rights Commission (OCRC). Following an investigation and hearing, OCRC concluded that Little Forest could not justify excluding males from its staff as nurse's aides and ordered Little Forest to employ Lawson and to pay him back wages. The court of common pleas affirmed OCRC's order. In this appeal, we address Little Forest's seven assignments of error to determine whether substantive, reliable, and probative evidence supports the decision of the trial court. *Dayton Power and Light Co. v. Ohio Civil Rights Commission* (1987), 33 Ohio St. 3d 73, 74.

ASSIGNMENTS OF ERROR

"I. The court of common pleas erred when it overruled appellant's appeal as to the ruling by the Ohio Civil Rights Commission that appellant had the burden to prove that no reasonable management alternatives existed which would permit it to employ a male nurses' aide at the appellant's nursing home."

"II. The court of common pleas erred when it affirmed the Commission's order which was founded upon the rebuttal testimony of the

> Commission's expert witness, on the subject of the management of the nursing home, because the witness had never visited the appellant's facility, had never spoken with the residents of the nursing home, had never reviewed the floor plan of the facility and had no personal knowledge regarding the staff at the nursing home and hence was not qualified to render an opinion on the issues."

Little Forest contends that its only burden is to produce evidence which would justify the business practice of excluding men from positions as nurse's aides. Little Forest contends that the OCRC incorrectly allocated the burdens of production and persuasion which the parties were to bear.

The United States Supreme Court recently set forth the steps through which a plaintiff must proceed in proving the disparate impact of an employer's practices. *Wards Cove Packing Co., Inc. v. Antonio* (1989), 57 U. S. L. W. 4583. The analysis is applicable to this case. The plaintiff carries the burden of persuasion throughout the case. If, as here, the plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the employer to produce evidence that these hiring practices serve, in a significant way, the employer's legitimate employment goals. Once the evidence of business necessity has been produced, the burden shifts back to the plaintiff to show that alternative practices existed which could achieve the employer's employment goals. *Wards Cove Packing Co., Inc. v. Antonio* at 4588.

Following a review of the record, OCRC concluded, in part, as follows:

"***.

"4. In these cases Respondent [Little Forest] has the burden of proof. Respondent must prove: (a) there is a factual basis for its belief that women would object to intimate contact by male nurse's aides, and (b) it would not be possible to assign job responsiblities in such a manner as to minimize the clash between privacy rights of the patients and the antidiscrimination provisions of Ohio's Laws Against Discrimination. *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 25 FEP Cases 8092 (E.D. Ark. 1981); *Fesel, supra.*

"5. Respondent proved there was a factual basis for its belief that some female patients would object to being viewed in the nude or having their genitals touched by males. The testimony of the physician who treated many of Respondent's female patients and the nurses who cared for them supported this conclusion. The Commission did not present any evidence to the contrary.

"6. However, Respondent failed to prove it could not rearrange its method of assigning work to nurse's aides to eliminate the privacy problem. In fact, the evidence showed that Respondent's policy of hiring only female nurse's aides violates the privacy interests of its male patients who might object to being viewed in the nude or touched in the genital area by females. *See, Jones v. Hinds General Hospital*, 666 F. Supp. 933, 44 FEP Cases 1076 (S.D. Miss. 1987). (Hospital was required to have at least one male orderly on duty to protect male patients' privacy interests.)"

"***."

OCRC concluded that Little Forest "failed to prove" it was not possible to reassign job responsibilities. Little Forest does not have this burden. The burden was on OCRC to prove that Little Forest could make a reasonable accommodation which would allow Lawson to work and still maintain the privacy of the patients. The only proof presented by OCRC was Dr. Wykle's testimony. Dr. Wykle had never been to Little Forest, never spoke with the residents, had no knowledge of the floor plan or management of the staff. OCRC did not meet its burden.

Little Forest met its burden. It was improper to find Little Forest "failed to prove" a fact that it was not required to prove. Accordingly, we sustain Little Forest's first and second assignments of error.

ASSIGNMENTS OF ERROR

"III. The court of common pleas erred in refusing to set aside the Commission's ruling which allowed counsel for the Ohio Civil Rights Commission to obtain an expert witness after the conclusion of the hearing in order to controvert the testimony of the Appellant's witnesses.

"IV. The court of common pleas erred in refusing to set aside the procedural rulings by the Hearing Officer for the Ohio Civil Rights Commission which rulings denied the Appellant's motion to compel answers and quashed a subpoena and refused a motion *in limine* and a motion for postponement and Appellant's motion for recusal by the Hearing Officer."

Little Forest contends that the OCRC hearing examiner erroneously ruled on various procedural matters which had the cumulative effect of denying Little Forest a fair and impartial hearing. At issue are certain comments made by the hearing examiner during a phone

conversation, the denial of Little Forest's motion for the hearing officer to recuse himself and the summary denial of motions *in limine*, to compel answers to interrogatories, and for a continuance.

We have reviewed the entire record. The hearing examiner gave Little Forest opportunity to cross examine and to rebut OCRC's expert witness. Although the hearing examiner could have weighed some of his comments more carefully, we find no error in the hearing examiner's refusal to recuse himself. Nor was there error in the various procedural rulings which were made within the discretion of the hearing examiner. Accordingly, we overrule the third and fourth assignments of error.

ASSIGNMENT OF ERROR V

> "The court of common pleas erred in affirming that part of the ruling by the Ohio Civil Rights Commission which held that the appellant's unconditional offer of employment to the charging party did not toll appellant's liability for back pay."

Little Forest contends that its offer to employ Lawson as a custodial maintenance worker for one dollar more an hour than he would have received as a nurse's aide tolls it [sic] liability for back pay.

Lawson sought work in the medical, care-giving area or in electrical maintenance. He testified that he refused Little Forest's offer of custodial work because he did not find it comparable to what he wanted.

A claim for back pay is tolled where the claimant refuses an unconditional offer of substantially equivalent employment. *Ford Motor Co. v. E.E.O.C.* (1981), 458 U.S. 219, 232. Upon our review of the record, we find Little Forest made a reasonable accommodation which would have allowed Lawson more money to perform not

identical, but substantially similar work. In evaluating whether substantially similar employment was offered Lawson, we do not rely solely on Lawson's personal desire but rather consider the totalilty of the evidence. Accordingly, we find that the award of back pay was improper and sustain Little Forest's fifth assignment of error.

ASSIGNMENT OF ERROR VI

> "The court of common pleas erred in affirming that part of the ruling by the Ohio Civil Rights Commission which denied appellant's uncontroverted pre-hearing motion for summary judgment."

Prior to the hearing, Little Forest moved for summary judgment. The only question presented to the hearing officer was whether the uncontroverted facts in Little Forest's affidavits sufficiently established its business necessity defense.

The hearing examiner ruled that establishing that sex was a bona fide occupational qualification required some factual determinations. Under these facts, we find no error in the hearing examiner's decision to deny Little Forest's motion for summary judgment as a matter of law. Accordingly, we overrule Little Forest's sixth assignment of error.

ASSIGNMENT OF ERROR VII

> "The court of common pleas erred when it granted enforcement to the findings and rulings made by the Ohio Civil Rights Commission, on the merits of the case, because the findings and rulings are not supported by reliable, probative and substantial evidence on the record."

Given our discussion set forth in the previous asignments of error and based upon a complete and careful review of the record, we find that the record does not contain reliable, probative and substantial evidence supporting the findings, conclusions of law and order of OCRC and the subsequent affirmance by the trial court. Accordingly, we sustain Little Forest's seventh assignment of error.

SUMMARY

Based on the foregoing reasons, we sustain the first, second, fifth and seventh assignments of error and overrule all others. The decision of the trial court is reversed and the cause is remanded for further proceedings.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellees.

Exceptions.

/s/ JOSEPH E. CIRIGLIANO
For the Court

BAIRD, *J.*
Concurs

QUILLAN, *J.*
Concurs in Part and Dissents in Part Saying:

I agree with the opinion and judgment except as it relates to Assignment of Error V.

APPEARANCES:

DAVID H. SHAFFER and MICHAEL J. SPETRINO, *Attorneys at Law*, 50 S. Main St., #700, Akron, OH 44308 *for Plaintiff.*

GREGORY J. VINCENT, *Asst. Attorney General*, 50 W. Broad St., #1718, Columbus, OH 43215 *for Defendants.*

FINDING AND ORDER OF THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO

(Filed September 27, 1989)

No. CV 88 10 3514

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

JUDGE CAMPBELL

LITTLE FOREST MEDICAL CENTER OF AKRON,
Petitioner,

vs.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

FINDING AND ORDER

This case is before the Court on appeal from a ruling by the *Ohio Civil Rights Commission* which found inter alia that the Petitioner, Little Forest Medical Center of Akron, unlawfully discriminated against Rayferd Lawson on the basis of his gender (male) when it denied his employment as a nurse's aide at its nursing home.

Subsequent to a public hearing held on October 14, 1987, January 19, 1988 and May 24, 1988 before Franklin A. Martens, Esq. (a duly appointed hearing examiner) at the Commission's Regional Office in Akron, Ohio, the Commission, after reviewing the entire proceedings and the recommendations of the Hearing

Officer, issued its Findings of Fact, Conclusions of Law and Order. The order was issued on October 6, 1988. It is from this Finding and Order that the Petitioner appeals.

The law in Ohio is quite settled as to the limitations placed upon the Common Pleas Court considering an appeal of a ruling rendered by an adminstrative agency such as the Ohio Civil Rights Commission. O.R.C. Sec. 4112.06(E) mandates that the reviewing court can only find the Commission's order conclusive if it is supported by reliable, probative, and substantial evidence on the record and such additional evidence as the Court has admitted and considered as a whole. If the Court finds that the Commission has reached a conclusion based upon such evidence then the reviewing court must affirm and it cannot substitute its judgment for that of the Commission. The reviewing court cannot exercise independent judgment on the facts and the evidence as presented to the fact finder. Even if the reviewing court should determine that there are supportive conflicting views and that a different inference or finding could reasonably be made it is the choice of the commission that must prevail.

The reviewing court must depend upon the commission to determine the credibility of the witnesses to weigh the evidence in light of the expertise that it has in the area being litigated and to draw reasonable inferences therefrom. An appeal review cannot be a trial de novo of the ultimate question nor can it rule on the matters raised by the appellant concerning activities or rulings of the Hearing Officer which are not on the record.

The Court, having reviewed the entire record, including the brief of the petitioner and the brief of the appellee finds that the Commission's decision is supported by reliable, probative, and substantial evidence and is in accordance with the law and therefore affirms the Commission's Order.

It is the order of the Court that the Petitioner-Appellant takes such action as is required in the Order of the Commission.

Costs to Petitioner-Appellant.

So ordered.

/s/ JOHN H. CAMPBELL
Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE STATE OF OHIO CIVIL RIGHTS COMMISSION

(Issued October 6, 1988)

Complaint No. 4688

STATE OF OHIO

CIVIL RIGHTS COMMISSION

IN THE MATTER OF:
RAYFERD LAWSON,
Complainant,

vs.

LITTLE FOREST MEDICAL CENTER OF AKRON,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. *PRELIMINARY STATEMENT*

This matter comes before the Commission upon the sworn Charge Affidavit of Rayferd Lawson, Complainant, filed on October 29, 1986; Complaint and Notice of Hearing No. 4688 issued July 9, 1987; the timely Answer of Little Forest Medical Center of Akron, Respondent herein; the Official Record of the Public Hearing held on October 14, 1987; January 19, 1988; and May 24, 1988, before Franklin A. Martens, Esq., a duly appointed Hearing Examiner, and all Exhibits therein; the Post-Hearing Briefs filed by the Commission on June 23, 1988; by Respondent on July 11, 1988; the Reply

Brief filed by the Commission on July 22, 1988, and the Respondent's Objections to the Hearing Examiner's Report filed on August 29, 1988 and Respondent's Objections to Procedural Rulings made prior to, during and after trial filed on September 1, 1988.

II. *COMMISSION REVIEW*

The Charge Affidavit and the Complaint alleged that Respondent had failed to hire Complainant for reasons not applied equally to all persons without regard to their sex.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Little Forest Medical Center of Akron (Respondent) in violation of Revised Code Section 4112.02(A).

The Commission's efforts to eliminate the alleged discriminatory practices by conciliation were unsuccessful and a complaint was issued on July 9, 1987.

The complaint alleges that Respondent refused to hire Complainant for reasons not applied equally to all persons without regard to their sex.

Respondent filed a timely Answer to the complaint admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices.

A public hearing was held on October 14, 1987; January 19, 1988; and May 24, 1988 before Franklin Martens at the Commission's Regional Office in Akron, Ohio.

The record consists of the previously described pleadings, the transcript consisting of 315 pages of testimony, exhibits admitted into evidence at the

hearing, and the post-hearing briefs filed by the Commission on June 23, 1988 and by Respondent on July 11, 1988. The Commission filed a reply brief on July 22, 1988. The Respondent filed Objections to the Hearing Examiner's Report on August 29, 1988 and Objections to Procedural Rulings made prior to, during and after trial on September 1, 1988.

III. *STATEMENT OF THE CASE*

1. This is a case of sex discrimination. Respondent, Little Forest Medical Center, a nursing home, admits they refused to hire Rayferd Lawson, Complainant, as a nurse's aide, because of his sex.

2. Respondent claims they were unable to employ Mr. Lawson because they could not alter his work assignments to avoid compromising the rights of privacy of those female patients who might object to intimate personal care by males.

3. The Commission claims Respondent has no factual basis to support its conclusion that substantial numbers of female patients object to intimate personal care by males, and even if this were true, there is a sufficient number of male patients who could be cared for by Mr. Lawson.

IV. *FINDINGS OF FACT*

1. Complainant is an unemployed adult male seeking employment as a nurse's aide. He applied for a position with Respondent. Respondent found him qualified in all respects except one, his sex. Respondent rejected Complainant for employment because it wishes to maintain an all female staff of nurse's aides.

2. Respondent is the largest skilled nursing care facility for the elderly in Akron, Ohio. Most of its 256 patients are non-ambulatory and elderly. Approximately 50 of them are male. Most patients share a room with another patient of the same sex.

3. Quality patient care is one of Respondent's highest priorities, along with meeting all the patient's needs. Patient care is provided by a staff of ten registered nurses, 40 licensed practical nurses and 67 nurse's aides, all of whom are female. Nurse's aides provide most of the personal care to both male and female patients. Some of this is intimate personal care, such as bathing, and changing pads on incontinent patients. Some of it is not, such as feeding, cleaning up spills, bed making, and moving patients. Some of the aides' duties require them to be away from their assigned area, such as when they accompany a patient to the tub room.

4. Some of Respondent's female patients would object if a male nurse's aide was assigned to provide them intimate personal care.

5. Respondent assigns nurse's aides to blocks of rooms that are adjacent or next to each other. Aides are assigned 8, 12 or 16 patients, depending on their shifts. The ratio of aides to patients is lowest on the day shift and highest on the night shift. Since patients at Little Forest rarely change rooms, most aides care for the same patients every day.

6. Other skilled care nursing homes in northern Ohio assign nurse's aides to patients based on what is best for the patient, not room location. They observe patients' preferences for aides of the same sex when patients object to an aide on the basis of personal privacy.

7. Respondent could modify its work assignment system to protect the privacy interests of male and female patients without excluding all males from employment as nurse's aides.

V. *CONCLUSIONS OF LAW AND DISCUSSION*

1. The legal issue in this case is simple: Based on the facts in the record, can Respondent justify excluding males from its staff of nurse's aides? That is, legally speaking, is sex a bona fide occupational qualification (bfoq) for the position of nurse's aide?

2. Generally speaking the bfoq exception to the prohibition against sex discrimination is narrowly construed. Respondent must justify the exception and the burden is a heavy one. *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346, 17 FEP Cases 330 (D. Del. 1978), *affd.* 591 F. 2d 1334, 19 FEP Cases 887 (3rd Cir. 1979).

3. However, depending upon the circumstances, the courts have granted an exception, where the personal privacy rights of "customers" (patients) are at stake. *Fesel, supra.*

4. In these cases Respondent has the burden of proof. Respondent must prove: (a) there is a factual basis for its belief that women would object to intimate contact by male nurse's aides, and (b) it would not be possible to assign job responsibilities in such a manner as to minimize the clash between privacy rights of the patients and the antidiscrimination provisions of Ohio's Laws Against Discrimination. *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 25 FEP Cases 8092 (E.D. Ark. 1981); *Fesel, supra.*

5. Respondent proved there was a factual basis for its belief that some female patients would object to being viewed in the nude or having their genitals touched by males. The testimony of the physican who treated many of Respondent's female patients and the nurses who cared for them supported this conclusion. The Commission did not present any evidence to the contrary.

6. However, Respondent failed to prove it could not rearrange its method of assigning work to nurse's aides to eliminate the privacy problem. In fact, the evidence showed that Respondent's policy of hiring only female nurse's aides violates the privacy interests of its male patients who might object to being viewed in the nude or touched in the genital area by females. *See, Jones v. Hinds General Hospital,* 666 F. Supp. 933, 44 FEP Cases 1076 (S.D. Miss. 1987). (Hospital was required to have at least one male orderly on duty to protect male patients' privacy interests).

7. In addition, the Commission's expert witness testified that Respondent could assign a male nurse's aide to serve only male patients without diminishing the quality of patient care, or Respondent could modify its nurse assignment system and assign the male nurse's aide selectively to those female patients who did not object to such assignments.

8. This testimony was more persuasive than Respondent's testimony from its administrator that this was not possible. Since Respondent employs 67 nurse's aides and has approximately 50 male patients, it is difficult to conceive of a scenario where Respondent could not utilize at least one male nurse's aide. As the court noted in *Fesel, supra*:

> In a larger home with more staff, selective assignment of job responsibilities might well be more feasible .... It does seem that the hiring of males would be feasible in a substantially larger home. See, e.g., EEOC Dec. 71-2410, 4 FEP Cases 17, *supra*, where the home in question had 194 beds and a nursing staff of 30 persons.

Fesel at 1354, f.n. 9.

9. The Commission has jurisdiction over the subject matter and the parties of this Complaint.

10. The Commission has proven by reliable, probative and substantial evidence that Respondent has discriminated against Complainant in violation of 4112.02(A) of the Revised Code.

VI. *ORDER*

It is ORDERED that:

1. Respondent cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;

2. Respondent make an offer of employment to Complainant within ten days of this Final Order for the position of nurse's aide. If Complainant accepts Respondent's offer of employment, Complainant shall be paid at the same wage he would have been paid had he been employed as a nurse's aide on June 17, 1986 and continued to be so employed up to the date of Respondent's offer of employment;

3. Whether or not Complainant accepts the position offered by Respondent, within ten days of receipt of the Commission's Final Order, Respondent shall submit to the Commission a certified check payable to Complainant for the amount Complainant would have earned had he

been employed through the date of Respondent's offer of employment, including any raises Complainant would have received, less Complainant's interim earnings, plus interest at the maximum rate allowable by law.[1]

4. Respondent shall not within one year of hiring Complainant take any action to discipline, demote or discharge him without notifying the Commission within ten days of such action of the circumstances thereof, and the reasons therefor.

This ORDER issued by the Ohio Civil Rights Commission this 6th day of October, 1988.

/s/ WILLIAM SYKES
William Sykes, Chairperson

/s/ ALYCE D. LUCAS
Alyce Lucas, Commissioner

/s/ JOHN H. BURLEW
John H. Burlew, Commissioner

/s/ KATHLEEN L. WHELAN
Kathleen Whelan, Commissioner

Jose Pena, Commissioner

---

[1] Respondent claims Complainant is not entitled to back pay after May 4, 1987 because Respondent made Complainant an unconditional offer of employment as a full-time employee in the maintenance department on that date. This is incorrect.

An offer of employment in a different job by Respondent does not toll back pay. The offer must be for the job originally sought. Although Complainant noted "electrical maintenance" on his employment application along with "EKG Tech" and "nursing assistant", his primary goal was to obtain a position as a nursing assistant. In any event, Respondent did not offer Complainant a job in electrical maintenance. The job Respondent offered was in the maintenance department and was "essentially janitorial." *See, Ford Motor Company v. EEOC*, 29 FEP Cases 121, 126 (1982).

NOTICE OF JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this ORDER and the mode and procedure thereof.

CERTIFICATE

I, William C. Betcher, Chief of Enforcement of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the ORDER issued *In The Matter of: Rayferd Lawson v. Little Forest Medical Center of Akron*, Complaint No. 4688 and filed with the Commission at its Central Office in Columbus, Ohio.

/s/ WILLIAM C. BETCHER
William C. Betcher
Chief of Enforcement

DATE: October 5, 1988

HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

(Dated August 12, 1988)

COMPLAINT NUMBER 4688
74060086 (09833) 102986
22A-87-6048

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF
RAYFERD LAWSON,
Complainant,

and

LITTLE FOREST MEDICAL CENTER OF AKRON,
Respondent.

HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

ANTHONY J. CELEBREZZE JR.
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REPORT BY:

FRANKLIN A. MARTENS, ESQ.
Hearing Examiner
Division of Hearings
220 Parsons Avenue
Columbus, Ohio 43266-0543
(614) 466-9156

PROCEDURAL HISTORY

Rayford Lawson (Complainant) filed a charge affidavit with the Ohio Civil Rights Commission (Commission) on October 29, 1986.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Little Forest Medical Center of Akron (Respondent) in violation of Revised Code Section 4112.02(A).

The Commission's efforts to eliminate the alleged discriminatory practices by conciliation were unsuccessful and a complaint was issued on July 9, 1987.

The complaint alleges that Respondent refused to hire Complainant for reasons not applied equally to all persons without regard to their sex.

Respondent filed a timely Answer to the complaint admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices.

A public hearing was held on October 14, 1987; January 19, 1988; and May 24, 1988 at the Commission's Regional Office in Akron, Ohio.

The record consists of the previously described pleadings, the transcript consisting of 315 pages of testimony, exhibits admitted into evidence at the hearing, and the post-hearing briefs filed by the Commission on June 23, 1988 and by Respondent on July 11, 1988. The Commission filed a reply brief on July 22, 1988.

STATEMENT OF THE CASE

1. This is a case of sex discrimination. Respondent, Little Forest Medical Center, a nursing home, admits they refused to hire Rayford Lawson, Complainant, as a nurse's aide, because of his sex.

2. Respondent claims they were unable to employ Mr. Lawson because they could not alter his work assignments to avoid compromising the rights of privacy of those female patients who might object to intimate personal care by males.

3. The Commission claims Respondent has no factual basis to support its conclusion that substantial numbers of female patients object to intimate personal care by males, and even if this were true, there is a sufficient number of male patients who could be cared for by Mr. Lawson.

FINDINGS OF FACT

1. Complainant is an unemployed adult male seeking employment as a nurse's aide. He applied for a position with Respondent. Respondent found him qualified in all respects except one, his sex. Respondent rejected Complainant for employment because it wishes to maintain an all female staff of nurse's aides.

2. Respondent is the largest skilled nursing care facility for the elderly in Akron, Ohio. Most of its 256 patients are non-ambulatory and elderly. Approximately 50 of them are male. Most patients share a room with another patient of the same sex.

3. Quality patient care is one of Respondent's highest priorities, along with meeting all the patient's needs. Patient care is provided by a staff of ten registered nurses, 40 licensed practical nurses, and 67 nurse's aides, all of whom are female. Nurse's aides provide most of the personal care to both male and female patients. Some of this is intimate personal care, such as bathing, and changing pads on incontinent patients. Some of it is not, such as feeding, cleaning up spills, bed making, and moving patients. Some of the aides' duties require them to be away from their assigned area, such as when they accompany a patient to the tub room.

4. Some of Respondent's female patients would object if a male nurse's aid was assigned to provide them intimate personal care.

5. Respondent assigns nurse's aides to blocks of rooms that are adjacent or next to each other. Aides are assigned 8, 12 or 16 patients, depending on their shifts. The ratio of aides to patients is lowest on the day shift

and highest on the night shift. Since patients at Little Forest rarely change rooms, most aides care for the same patients every day.

6. Other skilled care nursing homes in northern Ohio assign nurse's aides to patients based on what is best for the patient, not room location. They observe patient's preferences for aides of the same sex when patients object to an aide on the basis of personal privacy.

7. Respondent could modify its work assignment system to protect the privacy interests of male and female patients without excluding all males from employment as nurse's aides.

CONCLUSIONS OF LAW AND DISCUSSION

1. The legal issue in this case is simple: Based on the facts in the record, can Respondent justify excluding males from its staff of nurse's aides? That is, legally speaking, is sex a bona fide occupational qualification (bfoq) for the position of nurse's aide?

2. Generally speaking the bfoq exception to the prohibition against sex discrimination is narrowly construed. Respondent must justify the exception and the burden is a heavy one. *Fesel v. Masonci* [sic] *Home of Delaware, Inc,* 447 F. Supp. 1346, 17 FEP Cases 330 (D. Del. 1978), *affd.* 591 F. 2d 1334, 19 FEP Cases 887 (3rd Cir. 1979).

3. However, depending upon the circumstances, the courts have granted an exception, where the personal privacy rights of "customers" (patients) are at stake. *Fesel, supra.*

4. In these cases Respondent has the burden of proof. Respondent must prove: (a) there is a factual basis for its belief that women would object to intimate contact by male nurse's aides, and (b) it would not be possible to assign job responsibilities in such a manner as to minimize the clash between the privacy rights of the patients and the antidiscrimination provisions of Ohio's Laws Against Discrimination. *Bachus v. Baptist Medical Center*, 510 F. Supp. 1191, 25 FEP Cases 8092 (E.D. Ark. 1981); *Fesel, supra.*

5. Respondent proved there was a factual basis for its belief that some female patients would object to being viewed in the nude or having their genitals touched by males. The testimony of the physican who treated many of Respondent's female patients and the nurses who cared for them supported this conclusion. The Commission did not present any evidence to the contrary.

6. However, Respondent failed to prove it could not rearrange its method of assigning work to nurse's aides to eliminate the privacy problem. In fact, the evidence showed that Respondent's policy of hiring only female nurse's aides violates the privacy interests of its male patients who might object to being viewed in the nude or touched in the genital area by females. *See, Jones v. Hinds General Hospital*, 666 F. Supp. 933, 44 FEP Cases 1076 (S.D. Miss. 1987). (Hospital was required to have at least one male orderly on duty to protect male patients' privacy interests.)

7. In addition, the Commission's expert witness testified that Respondent could assign a male nurse's aide to serve only male patients without diminishing the quality of patient care, or Respondent could modify its

nurse assignment system and assign the male nurse's aide selectively to those female patients who did not object to such assignments.

8. This testimony was more persuasive than Respondent's testimony from its administrator that this was not possible. Since Respondent employs 67 nurse's aides and has approximately 50 male patients, it is difficult to conceive of a scenario where Respondent could not utilize at least one male nurse's aide. As the court noted in *Fesel, supra*:

> In a larger home with more staff, selective assignment of job responsibilities might well be more feasible . . . . It does seem that the hiring of males would be feasible in a substantially larger home. See, e.g., EEOC Dec. 71-2410, 4 FEP Cases 17, *supra*, where the home in question had 194 beds and a nursing staff of 30 persons.

Fesel at 1354, f.n. 9.

RECOMMENDATIONS

For all the foregoing reasons, it is recommended that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;

2. The Commission order Respondent to make an offer of employment to Complainant within ten days of the Commission's Final Order for the position of nurse's aide. If Complainant accepts Respondent's offer of employment, Complainant shall be paid at the same wage he would have been paid had he been employed as a nurse's aide on June 17, 1986 and continued to be so employed up to the date of Respondent's offer of employment;

3. Whether or not Complainant accepts the position offered by Respondent, within ten days of receipt of the Commission's Final Order, Respondent shall submit to the Commission a certified check payable to Complainant for the amount Complainant would have earned had he been employed as a nurse's aide on June 17, 1986 and had been employed through the date of Respondent's offer of employment, including any raises Complainant would have received, less Complainant's interim earnings, plus interest at the maximum rate allowable by law.[1]

4. Respondent shall not within one year of hiring Complainant take any action to discipline, demote or discharge him without notifying the Commission within ten days of such action of the circumstances thereof, and the reasons therefor.

/s/ FRANKLIN A. MARTENS
Hearing Examiner

August 12, 1988

---

[1] Respondent claims Complainant is not entitled to back pay after May 4, 1987 because Respondent made Complainant an unconditional offer of employment as a full-time employee in the maintenance department on that date. This is incorrect.

An offer of employment in a different job by Respondent does not toll back pay. The offer must be for the job originally sought. Although Complainant noted "electrical maintenance" on his employment application along with "EKG Tech" and "nursing assistant", his primary goal was to obtain a position as a nursing assistant. In any event, Respondent did not offer Complainant a job in electrical maintenance. The job Respondent offered was in the maintenance department and was "essentially janitorial." *See, Ford Motor Company v. EEOC*, 29 FEP Cases 121, 126 (1982).

ORDER OF THE SUPREME COURT OF OHIO DENYING PETITION FOR REHEARING

(Dated October 16, 1991)

Case No. 90-1052

THE SUPREME COURT OF OHIO

1991 TERM

To wit: October 16, 1991

LITTLE FOREST MEDICAL CENTER OF AKRON,
Appellee/Cross-Appellant,

v.

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants/Cross-Appellees.

REHEARING ENTRY

(Summit County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 14312)

THOMAS J. MOYER
Thomas J. Moyer
Chief Justice

42 U.S.C. §2000e-2

Sec. 2000e-2. Unlawful Employment Practices

(a) It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which

would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution

of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ an individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national

security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise

under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. §2000e-5

Sec. 2000e-5. Enforcement Provisions

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings, commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the

Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall makes its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon

which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal

proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c)

or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the

Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear

and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual

as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(k) In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

42 U.S.C. §1396r(c)

(c) Requirements relating to residents' rights

J(1) General rights

(A) Specified rights

A nursing facility must protect and promote the rights of each resident, including each of the following rights:

(i) Free choice

The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

(ii) Free from restraints

The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed—

(I) to ensure the physical safety of the resident or other residents, and

(II) only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained).

(iii) Privacy

The right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups.

(iv) Confidentiality

The right to confidentiality of personal and clinical records.

(v) Accommodation of needs

The right—

(I) to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered, and

(II) to receive notice before the room or roommate of the resident in the facility is changed.

(vi) Grievances

The right to voice grievances with respect to treatment or care that is (or fails to be) furnished, without discrimination or reprisal for voicing the grievances and the right to prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

(vii) Participation in resident and family groups

The right of the resident to organize and participate in resident groups in the facility and the right of the resident's family to meet in the facility with the families of other residents in the facility.

(viii) Participation in other activities

The right of the resident to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.

(ix) Examination of survey results

The right to examine, upon reasonable request, the results of the most recent survey of the facility conducted by the Secretary or a State with respect to the facility and any plan of correction in effect with respect to the facility.

(x) Other rights

Any other right established by the Secretary.

Clause (iii) shall not be construed as requiring the provision of a private room.

29 C.F.R. §1601.13

Sec. 1601.13. Filing; Deferrals to State and Local Agencies

(a) *Initial presentation of a charge to the Commission.* (1) Charges arising in jurisdictions having no FEP Agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a FEP Agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP Agency. Charges over which a FEP Agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a FEP Agency with subject matter jurisdiction over the charges are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of section 706(c) of Title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII or the ADA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and

local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable. (As amended by 56 FR 45, eff. April 8, 1991)

(ii) Section 706(c) of Title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in §1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A FEP Agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of Title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate FEP Agency.

(4) The following procedures shall be followed with respect to charges which arise in jurisdictions having a FEP Agency with subject matter jurisdiction over the charges.

(i) Where any document, whether or not verified, is received by the Commission as provided in §1601.8 which may constitute a charge cognizable under Title VII or the ADA, and where the FEP Agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the

appropriate FEP Agency as provided in the procedures set forth below: (As amended by 56 FR 45, eff. April 8, 1991)

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate FEP Agency, or, where the FEP Agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the FEP Agency pursuant to the provisions of section 706(c) of Title VII. (As amended by 56 FR 45, eff. April 8, 1991)

(ii) Such charges are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the FEP Agency has waived its rights to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the FEP Agency has waived its right to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the Commission shall process the

document in accordance with paragraph (a)(4)(i) of this section. The charge shall be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of FEP Agency proceedings, or upon waiver of the FEP Agency's right to exclusively process the charge, whichever is earliest. Where the FEP Agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the FEP Agency terminated its proceedings or the FEP Agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

(b) *Initial presentation of a charge to a FEP Agency.* (1) When a charge is initially presented to a FEP Agency and the charging party requests that the charge be presented to the Commission, the charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP Agency by registered mail or was otherwise received by the FEP Agency, or upon the termination of FEP Agency proceedings, or upon waiver of the FEP Agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

(2) When a charge is initially presented to a FEP Agency but the charging party does not request that the charge be presented to the Commission, the charging party may present the charge to the Commission as follows:

(i) If the FEP Agency has refused to accept a charge, a subsequent submission of the charge to the Commission will be processed as if it were an initial presentation in accordance with paragraph (a) of this section.

(ii) If the FEP Agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the FEP Agency proceedings have been terminated or within 300 days from the date of the alleged violation, whichever is earlier.

(iii) If the FEP Agency proceedings have not been terminated, the charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP Agency by certified mail or was otherwise received by the FEP Agency, or upon the termination of the FEP Agency proceedings, or upon waiver of the FEP Agency's right to exclusively process the charge, whichever is earliest. To be timely, however, such filing must be effected within 300 days from the date of the alleged violation.

(c) *Agreements With Fair Employment Practice Agencies.* Pursuant to section 705(g)(1) and section 706(b) of Title VII, the Commission shall endeavor to enter into agreements with FEP Agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the

FEP Agency during the period specified in section 706(c) and section 706(d) of Title VII. (As amended by 56 FR 45, eff. April 8, 1991)

(d) *Preliminary relief.* When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence judicial action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of Title VII.

(e) *Commissioner charges.* A charge made by a member of the Commission shall be deemed filed upon receipt by the Commission office responsible for investigating the charge. The Commission will notify a FEP Agency when an allegation of discrimination is made by a member of the Commission concerning an employment practice occurring within the jurisdiction of the FEP Agency. The FEP Agency will be entitled to process the charge exclusively for a period of not less than 60 days if the FEP Agency makes a written request to the Commission within 10 days of receiving notice that the allegation has been filed. The 60-day period shall be extended to 120 days during the first year after the effective date of the qualifying State or local law. (As amended by 52 FR No. 61, eff. March 31, 1987)

Ohio Revised Code §3721.13

3721.13 Rights of residents of a home; sponsor; attempted waiver void

(A) The rights of residents of a home shall include, but are not limited to, the following:

(1) The right to a safe and clean living environment pursuant to Titles XVIII and XIX of the "Social Security Act" 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, and appliable state laws and regulations prescribed by the public health council;

(2) The right to be treated at all times with courtesy and respect, and full recognition of dignity and individuality;

(3) Upon admission and thereafter, the right to adequate and appropriate medical treatment and nursing care and to other services that comprise necessary and appropriate care consistent with the program for which the resident contracted, without regard to considerations such as race, color, religion, national origin, age, or source of payment for care;

(4) The right to have all reasonable requests and inquiries responded to promptly;

(5) The right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation;

(6) The right to obtain from the home, upon request, the name and any specialty of any physician or other person responsible for the resident's care or for the coordination of care;

(7) The right, upon request, to be assigned, within the capacity of the home to make the assignment, to the staff physician of the resident's choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home. If the cost of a physician's services is to be met under a federally supported program, the physician shall meet the federal laws and regulations governing such services.

(8) The right, in accordance with the rules of the home, to communicate with the physician in planning the resident's treatment or care and to obtain from the attending physician complete and current information concerning medical condition, prognosis, and treatment plan, in terms the resident can reasonably be expected to understand; the right of access to all information in his medical record; and the right to give or withhold informed consent for treatment after the consequences of that choice have been carefully explained. When the attending physician finds that it is not medically advisable to give the information to the resident, the information shall be made available to the resident's attorney or to the sponsor on the resident's behalf, if the sponsor has a legal interest or is authorized by the resident to receive the information. The home is not liable for a violation of this division if the violation is found to be the result of an act or omission on the part of a physician selected by the resident who is not otherwise affiliated with the home.

(9) The right to withhold payment for physician visitation if the physician did not visit the resident;

(10) The right to confidential treatment of personal and medical records, and the right to approve or refuse the release of these records to any individual outside the home, except in case of transfer to another home, hospital, or health care system, as required by law or rule, or as required by a third-party payment contract;

(11) The right to privacy during medical examination or treatment and in the care of personal or bodily needs;

(12) The right to refuse, without jeopardizing access to appropriate medical care, to serve as a medical research subject;

(13) The right to be free from physical or chemical restraints or prolonged isolation except to the minimum extent necessary to protect the resident from injury to himself, others, or to property and except as authorized in writing by the attending physician for a specific and limited period of time and documented in the resident's medical record. Prior to authorizing the use of a physical or chemical restraint on any resident, the attending physician shall make a personal examination of the resident and an individualized determination of the need to use the restraint on that resident.

Physical or chemical restraints or isolation may be used in an emergency situation without authorization of the attending physician only to protect the resident from injury to himself or others. Use of the physical or chemical restraints or isolation shall not be continued for more than twelve hours after the onset of the emergency without personal examination and authorization by the attending physician. The attending physician or a staff physician may authorize continued use of physical or chemical restraints for a period not to exceed thirty

days, and at the end of this period and any subsequent period may extend the authorization for an additional period of not more than thirty days. The use of physical or chemical restraints shall not be continued without a personal examination of the resident and the written authorization of the attending physician stating the reasons for continuing the restraint.

If physical or chemical restraints are used under this division, the home shall ensure that the restrained resident receives a proper diet. In no event shall physical or chemical restraints or isolation be used for punishment, incentive, or convenience.

(14) The right to the pharmacist of the resident's choice and the right to receive pharmaceutical supplies and services at reasonable prices not exceeding applicable and normally accepted prices for comparably packaged pharmaceutical supplies and services within the community;

(15) The right to exercise all civil rights, unless the resident has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code and has not been restored to legal capacity, as well as the right to the cooperation of the home's administrator in making arrangements for the exercise of the right to vote;

(16) The right to consume a reasonable amount of alcoholic beverages at his own expense, unless not medically advisable as documented in his medical record by the attending physician or unless contradictory to written admission policies;

(17) The right to use tobacco at his own expense under the home's safety rules and under appliable laws and rules of the state, unless not medically advisable as

documented in his medical record by the attending physician or unless contradictory to written admission policies;

(18) The right to retire and rise in accordance with his reasonable request, if he does not disturb others or the posted meal schedules and upon the home's request remains in a supervised area, unless not medically advisable as documented by the attending physician;

(19) The right to observe religious obligations and participate in religious activities; the right to maintain individual and cultural identity; and the right to meet with and participate in activities of social and community groups at the resident's or the group's initiative, unless not medically advisable as documented in his medical record by the attending physician;

(20) The right upon reasonable request to private and unrestricted communications with his family, social worker, and any other person, unless not medically advisable as documented in his medical record by the attending physician, except that communications with public officials or with his attorney or physician shall not be restricted. Private and unrestricted communications shall include, but are not limited to, the right to:

(a) Receive, send, and mail sealed, unopened correspondence;

(b) Reasonable access to a telephone for private communications;

(c) Private visits at any reasonable hour.

(21) The right to assured privacy for visits by the spouse, or if both are residents of the same home, the right to share a room within the capacity of the home, unless not medically advisable as documented in his medical record by the attending physician;

(22) The right upon reasonable request to have room doors closed and to have them not opened without knocking, except in the case of an emergency or unless not medically advisable as documented in his medical record by the attending physician;

(23) The right to retain and use personal clothing and a reasonable amount of possessions, in a reasonably secure manner, unless to do so would infringe on the rights of other residents or would not be medically advisable as documented in his medical record by the attending physician;

(24) The right to be fully informed, prior to or at the time of admission and during his stay, in writing, of the basic rate charged by the home, of services available in the home, and of any additional charges related to such services, including charges for services not covered under Titles XVIII and XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended. The basic rate shall not be changed unless thirty days notice is given to the resident or, if the resident is unable to understand this information, to his sponsor.

(25) The right of the resident and person paying for the care to examine and receive a bill at least monthly for the resident's care from the home that itemizes charges not included in the basic rates;

(26) The right to manage his personal financial affairs, or, should the home accept written delegation of this responsibility, to receive upon written request at least a quarterly accounting statement of financial transactions made on his behalf. The statement shall include:

(a) A complete record of all funds, personal property, or possessions of a resident from any source whatsoever, that have been deposited for safekeeping with the home for use by the resident or his sponsor;

(b) A listing of all deposits and withdrawals transacted, which shall be substantiated by receipts which shall be available for inspection and copying by the resident or sponsor.

(27) The right of the resident to be allowed unrestricted access to his property on deposit at reasonable hours, unless requests for access to property on deposit are so persistent, continuous, and unreasonable that they constitute a nuisance;

(28) The right not to be transferred or discharged from the home except for medical reasons, for his welfare or another resident's, for nonpayment of charges due the home, if the home's license is revoked under section 3721.03 of the Revised Code, if the home is being closed pursuant to section 5155.31 of the Revised Code, or if he is a recipient of medical assistance under section 5101.51 of the Revised Code in a home whose certification is terminated or denied under Title XVIII or XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.

(29) The right to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal. This right includes access to a residents' rights advocate, and the right to be a member of, to be active in, and to associate with

persons who are active in organizations of relatives and friends of nursing home residents and other organizations engaged in assisting residents.

(30) The right to have any significant change in his health status reported to his sponsor. As soon as such a change is known to the home's staff, the home shall make a reasonable effort to notify the sponsor within twelve hours.

(B) A sponsor may act on a resident's behalf to assure that the home does not deny the resident's rights under sections 3721.10 to 3721.17 of the Revised Code.

(C) Any attempted waiver of the rights listed in division (A) of this section is void.

HISTORY: 1978 H 600, eff. 4-9-79

Ohio Revised Code §4112.02

4112.02 Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, handicap, age, or ancestry to:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request indicates, directly or indirectly, that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, handicap, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, handicap, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency or personnel placement service, or labor organization, prior to employment or admission to membership, to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank seeking to elicit information regarding race, color, religion, sex, national origin, handicap, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency thereof, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain such proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference,

limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of such group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement which specifies or in any manner indicates that person's race, color, religion, sex, national origin, handicap, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, handicap, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges thereof.

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations,

or otherwise deny or make unavailable housing accommodations because of the race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing;

(2) Represent to any person that housing is not available for inspection, sale, or rental, when in fact it is available, because of the race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing or otherwise withhold financing of housing from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing or subleasing any housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing, including the sale of fire, extended coverage, or homeowners insurance, because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owners, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof;

(7) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, ancestry, handicap, or national origin, or an intention to make any such preference, limitation, specification or discrimination.

(8) Except as otherwise provided in division (H)(8) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, ancestry, handicap, or national origin in connection with the sale or lease of any housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing. Any person may make inquiries, and make and keep records

concerning race, color, religion, sex, ancestry, handicap, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(10) Induce or solicit or attempt to induce or solicit a housing listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, sex, ancestry, handicap, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or to discriminate against any

person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of a housing unit, by representing that any block, neighborhood, or area has undergone or might undergo a change with respect to the religious, racial, sexual, or ethnic composition of the block, neighborhood, or area;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry, handicap, or national origin of any prospective owner or user of such lot.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful practice defined in this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with sections 4112.01 to 4112.11 of the Revised Code, or any order issued thereunder, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such a dwelling to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin. Nothing in division (H) of this section shall bar any bona fide private or fraternal organization which, incidental to its primary purpose, owns or operates lodging for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a handicapped person to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed, or to employ or train a handicapped person in a job that requires him routinely to undertake any task, the performance of which is substantially and inherently impaired by his handicap.

(M) Nothing in division (H) of this section shall be construed to require any person selling or renting property to modify such property in any way or to exercise a higher degree of care for a person having a handicap, nor shall it be construed to relieve any handicapped person of any obligation generally imposed on all persons regardless of handicap in a written lease,

rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce his rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful practice occurred, in any court of competent jurisdiction for any legal or equitable relief that will effectuate his rights. A person who files a civil action under this division is, with respect to the practices complained of, thereby barred from instituting a civil action under section 4101.17 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4101.17 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation which may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section; however, no such employee benefit plan shall excuse the

failure to hire any individual and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual because of his age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," P.L. 95-256 (Sec. (2)(b), 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623;

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," P.L. 95-256 Sec. (3), 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631;

(4) To observe the terms of any bona fide apprenticeship program if such program is registered with the Ohio apprenticeship council pursuant to sections 4101.25 to 4101.30 of the Revised Code, and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4101.17 of the Revised Code shall be construed to prohibit:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law which may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or fire fighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and fire fighters.

(7) The mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 0.01503, 20 U.S.CA. 1141(a).

Ohio Administrative Code §5101:3-3-08

5101:3-3-08 Residents' rights in long-term care facilities

(A) Each medicaid resident or his authorized representative must:

(1) Be fully informed, before or at the time of admission, and at the time of any facility revision to its policies, of his/her rights and responsibilities and of all rules governing resident conduct;

(2) Acknowledge in writing the receipt of the information and any amendments to it;

(3) Be fully informed in writing either before or at the time of admission and as changes occur, of all services available and of the charges for services not paid for by medicaid or not included in the per diem rate;

(4) Be fully informed by a physician of his/her health and medical condition unless the physician documents that informing the resident is medically contraindicated;

(5) Be given the opportunity to participate in planning his/her total care and medical treatment;

(6) Be given the opportunity to refuse treatment;

(7) Give informed, written consent before participating in experimental research;

(8) Have documentation in his/her record of a physician's decision that informing the resident of his/her medical condition is medically contraindicated;

(9) Be transferred or discharged only for medical reasons, or for his/her welfare or that of the other residents, or for nonpayment of the resident's stay except as prohibited by the medicaid program and is

given reasonable advance notice to assume orderly transfer or discharge, and such actions are documented in his/her medical record;

(10) Be encouraged and assisted to exercise his/her rights as a resident and as a citizen;

(11) Be allowed to submit complaints or recommendations concerning the policies and services of the facility to staff and/or outside representatives of the resident's choice free from restraint, interference, coercion, discrimination, or reprisal;

(12) Be allowed to manage his/her financial affairs;

(13) Request in writing any assistance from the facility in the management of his/her financial affairs;

(14) Be free from mental and physical abuse;

(15) Be free from chemical and physical restraints unless the restraints are authorized by a physician in writing for a specified period of time, or in an emergency to protect the resident from himself or others, as authorized by a staff member in writing, and the use is reported promptly to the resident's physician;

(16) Be assured the confidential treatment of his/her records, including information in an automatic data bank, except in the case of transfer to another facility or as required by law or by third party payment contract;

(17) Give written consent before the facility may release information from his/her record to someone not authorized by law to receive it;

(18) Be treated with consideration, respect, and full recognition of his/her dignity and individuality;

(19) Be given privacy during treatment and care of personal needs;

(20) Not be required to perform any services for the facility that are not included for therapeutic purposes in the resident's plan of care;

(21) Be allowed to communicate, associate, and meet privately with individuals of his/her choice, unless this infringes on the rights of another resident;

(22) Be allowed to send and receive personal mail unopened unless documented by the physician to be medically contraindicated;

(23) Be allowed to participate in social, religious, and community group activities unless such activities are documented by the physician to be medically contraindicated;

(24) Be allowed to retain and use his/her personal clothing and possessions as space permits;

(25) Be assured privacy for visits by his/her spouse;

(26) Be permitted to share a room with his/her spouse if both are residents of the facility unless documented by the physician in the medical record to be medically contraindicated.

(B) The aforementioned rights do not replace or supersede the residents' rights as identified in sections 173.02, 173.06, 3701.07, 3721.99, 3721.021, 3721.10, and 3721.18 of the Revised Code.

HISTORY: Eff. 7-1-80

ANSWER FILED WITH THE OHIO CIVIL RIGHTS COMMISSION

Case No. 4688

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

LITTLE FOREST MEDICAL CENTER OF AKRON

ANSWER

The Employer, Little Forest Medical Center of Akron, for its answer to the complaint, states as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. The Employer admits that Rayferd Lawson is a male who was refused employment by Respondent as a nurses' aide because of his sex. The Employer denies the remaining allegations of paragraph (4).

5. Denied.

6. Denied.

FIRST AFFIRMATIVE DEFENSE

Sex (female) is a bona fide occupational qualification for employment as a nurses' aide at Little Forest Medical Center of Akron.

SECOND AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

The Charging Party, Rayferd Lawson, refused, without justification, an unconditional offer of employment made by Respondent, to a position which Lawson had sought, and thereby he has failed to mitigate his damages and he is willfully unemployed and is not entitled to any relief.

Wherefore, having answered, Respondent demands that the complaint be dismissed.

Respectfully submitted,

/s/ DAVID H. SHAFFER

/s/ MICHAEL J. SPETRINO
JOONDEPH & SHAFFER
Suite 700
Akron Centre Plaza
50 South Main Street
Akron, Ohio 44308-1881
(216) 376-4500
Attorneys for Little Forest Medical Center of Akron

CERTIFICATE OF SERVICE

A copy of the foregoing Answer was mailed to Lula Anderson, Assistant Attorney General, Attorney for the Ohio Civil Rights Commission, Civil Rights Section, LeVegue-Lincoln Tower, 50 West Broad Street, 17th Floor, Columbus, Ohio 43215, by United States first class mail (postage prepaid) this 21st day of July, 1987.

MICHAEL J. SPETRINO

EXCERPT FROM PAGES 4 AND 5 OF BRIEF OF RESPONDENT FILED WITH OHIO CIVIL RIGHTS COMMISSION

SEX (FEMALE) IS A BONA FIDE OCCUPATIONAL QUALIFICATION FOR EMPLOYMENT AS A NURSE'S AIDE AT THE LITTLE FOREST MEDICAL CENTER

A BFOQ based on sex is established by showing that the essence of the business operation would be undermined unless the employer could employ members of one sex exclusively. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Once the employer has made a *prima facie* showing that sex is a bona fide occupational qualification, the burden shifts to the Ohio Civil Rights Commission to prove that reasonable alternatives exist which would moot the need for gender based discrimination. *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. The Olin Corporation*, 697 F.2d 1192 (4th Cir. 1982).

Sex has been recognized by the Courts as a bona fide occupational qualification for the employment of aides in a nursing home based on the privacy rights of the patients. *Jones v. Hinds General Hospital*, 666 F. Supp. 933 (S.D. Miss. 1987); *Fesel v. Masonic Home*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3rd Cir. 1979). Gender is a bona fide occupational qualification for employment as a nurse in the OB-GYN department of a hospital. *E.E.O.C. v. Mercy Health Center*, _____ F. Supp. _____, 29 FEP Cases 159 (W.D. Okla. 1982); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191 (D. Ark. 1981). Gender is also recognized as a BFOQ in provision of care to mental health patients on a same-sex basis. *A.F.S.C.M.E. Local 657 v. Michigan*, _____ F. Supp. _____, 40 FEP Cases 1648 (E.D. Mich. 1986).

EXCERPT FROM PAGE 8 OF BRIEF OF RESPONDENT FILED WITH OHIO CIVIL RIGHTS COMMISSION

NO REASONABLE ALTERNATIVES EXIST WHICH WOULD PERMIT THE EMPLOYMENT OF A MALE NURSE'S AIDE AT LITTLE FOREST MEDICAL CENTER

Once the employer establishes a *prima facie* case that sex is a bona fide occupational qualification, then the burden shifts to the Ohio Civil Rights Commission to prove that reasonable alternatives exist which would moot the need for gender based discrimination. *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Dothard, supra; Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Hayes, supra; Wright, supra.* This is analogous to the shifting burdens in the usual Title VII case where the employer articulates a legitimate, non-discriminatory reason for the disputed act and then the burden shifts to the other side to prove that the reason articulated by the employer is pretextual. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1980).

EXCERPT FROM PAGE 15 OF BRIEF OF RESPONDENT FILED WITH OHIO CIVIL RIGHTS COMMISSION

RESPONDENT'S UNCONDITIONAL OFFER OF EMPLOYMENT TOLLS THE ACCRUAL OF BACK PAY, IF ANY

The Center vigorously denies that it unlawfully discriminated against Lawson when it refused him employment as an aide. On May 4, 1987, however, the Center made Lawson an unconditional offer of employment as a full-time employee in the maintenance department. (Harrison at 120; Exhibit B). The Center's unconditional offer of employment to a position which is substantially equivalent to the one which he was denied tolls the accrual of back pay liability, if any. *Ford Motor Company v. E.E.O.C.*, 458 U.S. 219 (1982).

OBJECTIONS TO REPORT AND RECOMMENDATION OF THE OHIO CIVIL RIGHTS COMMISSION

Case No. 4688

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

LITTLE FOREST MEDICAL CENTER OF AKRON

OBJECTIONS TO REPORT AND RECOMMENDATION

HEARING EXAMINER: FRANKLIN A. MARTENS

The Respondent, Little Forest Medical Center of Akron, pursuant to Ohio Administrative Code Section 4112-3-09(B), hereby states its objections to the Report and Recommendation of the Hearing Examiner.

OBJECTIONS TO FINDINGS OF FACT

1. *Finding of Fact Number 3.* The Hearing Examiner erred when he impliedly found that nurses' aides spend less than 90% of their work time providing intimate personal care to patients.

2. *Finding of Fact Number 4.* The Hearing Examiner erred when he impliedly found that only some of the female patients would object to having a male aide provide their intimate personal care.

3. *Finding of Fact Number 7.* The Hearing Examiner erred when he found that Respondent could modify its work assignment system so as to permit the employment of males as nurses' aides.

OBJECTIONS TO CONCLUSIONS OF LAW

1. *Conclusion of Law Number 4.* The Hearing Officer erred when he ruled that the burden of proof in BFOQ case is on Respondent to show that no reasonable alternatives exist which would moot the need for gender-based discrimination.

2. *Conclusion of Law Number 6.* The Hearing Examiner erred when he found that Respondent could rearrange its method of assigning work so as to permit the employment of a male aide. Respondent further objects to the finding that Respondent's policy of hiring only female aides violates the privacy rights of the male patients.

3. *Conclusions of Law Number 7 and 8.* The Hearing Examiner erred when he credited the testimony of the Commissions' expert witness and rejected the testimony of Respondent's witneses on the issue of whether or not it was feasible to reassign work so as to permit the employment of a male aide.

OBJECTIONS TO RECOMMENDATIONS

1. Respondent objects to the recommendations of the Hearing Examiner in their entirety including the recommendation that the Complainant be offered employment as an aide and that the Complainant be awarded back pay from June 17, 1986.

2. Respondent objects to the Hearing Examiner's finding that Complainant is entitled to back pay after Respondent's offer of employment to the Complainant as a maintenance employee.

Respectfully submitted,

/s/ DAVID H. SHAFFER

EXCERPT FROM PAGE i OF BRIEF OF PETITIONER FILED WITH COURT OF COMMON PLEAS

Argument:

No Reasonable Management Alternatives Exist Which Would Permit the Employment of a Male Aide at Little Forest 8

Assignments of Error:

1. The Commission erred when it ruled that the Company had the burden to prove that no reasonable alternatives exist which would permit the employment of a male aide.

2. The Commission erred when it based its ruling on the testimony of the Commission's expert witness and rejected the testimony of the Company's witnesses on the issue of whether it was feasible to reassign work so as to permit the employment of a male aide.

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1974) 9

Chrisner v. Complete Autotransit, Inc., 645 F.2d 1251 (6th Cir. 1981) 9

Dothard v. Rawlinson, 433 U.S. 321 (1977) 8

Norwood v. Dale Maintenance System, Inc., 590 F. Supp. 1410 (N.D. Ill. 1984) 11

Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984) 9

Wards Cove Packings Co. v. Atonio, _____ U.S. _____, 57 U.S.L.W. 4583 (1989) 9

Wright v. The Olin Corporation, 697 F.2d 1172 (4th Cir. 1982) 9

EXCERPT FROM PAGE iii OF BRIEF OF PETITIONER FILED WITH COURT OF COMMON PLEAS

Argument:

The Company's Unconditional Offer of Employment Tolled Lawson's claim for Back Pay 17

Assignments of Error:

1. The Commission erred when it ruled that the Company's unconditional offer of employment did not toll Lawson's claim for back pay.

E.E.O.C. v. Exxon Shipping Co., 745 F.2d 967 (5th Cir. 1984) 17

Ford Motor Company v. E.E.O.C., 458 U.S. 219, 232 (1981) 17

Rasimas v. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir. 1983) *cert. den.* 466 U.S. 950 (1984) 17

EXCERPT FROM PAGE i OF BRIEF OF APPELLANT FILED WITH COURT OF APPEALS

Argument:

It was Error for the Ohio Civil Rights Commission to Place the Burden on Appellant to Show, After its BFOQ Defense was Proven, That There Were No Available Management Alternatives Whereby it Could Employ a Male in the Position of Nurses' Aide 9

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1974) 10

Chrisner v. Complete Autotransit, Inc., 645 F.2d 1251 (6th Cir. 1981) 10

Dothard v. Rawlinson, 433 U.S. 321 (1977) 10

Norwood v. Dale Maintenance System, Inc., 590 F. Supp. 1410 (N.D. Ill. 1984) 12

Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984) 10

Wards Cove Packings Co. v. Atonio, 490 U.S. _____, 109 S. Ct. 2115 (1989) 10

Watson v. Fort Worth Bank and Trust, _____ U.S. _____, 108 S. Ct. 2777 (1988) 9

Wright v. The Olin Corporation, 697 F.2d 1172 (4th Cir. 1982) 10

EXCERPT FROM PAGE ii OF BRIEF OF APPELLANT FILED WITH COURT OF APPEALS

Argument:

The Appellant's Unconditional Offer of Employment to the Charging Party Tolled its Liability for Back Pay..... 16

E.E.O.C. v. Exxon Shipping Co., 745 F.2d 967 (5th Cir. 1984)..... 17

Ford Motor Company v. E.E.O.C., 458 U.S. 219 (1981)..... 16,17

Rasimas v. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir. 1983) *cert. denied* 466 U.S. 950 (1984)..... 17

EXCERPT FROM PAGE 5 OF BRIEF OF OHIO CIVIL RIGHTS COMMISSION FILED WITH OHIO SUPREME COURT

ARGUMENT

PROPOSITION OF LAW NO. 1:

> WHEN AN EMPLOYER ASSERTS A BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) BASED ON THE PRIVACY INTERESTS OF ITS CLIENTS AS A DEFENSE TO UNREFUTED EVIDENCE OF DISCRIMINATION, THE EMPLOYER MUST PROVE THAT IT HAD A FACTUAL BASIS FOR BELIEVING THAT THE HIRING OF ANY MEMBERS OF ONE SEX WOULD DIRECTLY UNDERMINE THE ESSENCE OF THE JOB INVOLVED OR THE EMPLOYER'S BUSINESS, AND THAT IT COULD NOT REARRANGE JOB RESPONSIBILITIES IN SUCH A WAY THAT THERE WOULD BE A MINIMAL CLASH BETWEEN THE PRIVACY INTEREST OF THE CLIENTS AND THE EMPLOYMENT OPPORTUNITIES OF THE COMPLAINANT.

Section 4112.02(A) of the Revised Code makes it an unlawful discriminatory practice:

> For any employer, because of the *** sex *** of any person *** to discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment.

The burden of proving that Little Forest engaged in an unlawful discriminatory practice rests with the Commission. The Commission must establish by reliable, probative and substantial evidence that Little Forest

engaged in discriminatory conduct. *Plumbers & Steamfitters v. Ohio Civil Rights Commission* (1981), 66 Ohio St. 2d 192; *Sowers v. Ohio Civil Rights Commission* (C.P. Trumbull Cty., 1969), 20 Ohio Misc. 115; and R.C. 4112.05(E) and (G). The Ohio Supreme Court has held that Title VII standards may be used in evaluating alleged violations of Chapter 4112 of the Ohio Revised Code.

EXCERPTS FROM PAGES 5 AND 6 OF BRIEF OF LITTLE FOREST FILED WITH OHIO SUPREME COURT

PROPOSITION OF LAW NO. 1

IN A CASE ALLEGING SEX DISCRIMINATION IN EMPLOYMENT, ONCE THE EMPLOYER PROVES THAT THE ESSENCE OF ITS BUSINESS OPERATION WOULD BE UNDERMINED UNLESS IT COULD EMPLOY MEMBERS OF ONE SEX EXCLUSIVELY, THEN THE BURDEN SHIFTS TO THE COMPLAINANT TO PROVE THAT ALTERNATIVE MEANS ARE AVAILABLE TO MOOT THE NEED FOR GENDER BASED DISCRIMINATION AND STILL ACHIEVE THE LEGITIMATE BUSINESS INTERESTS OF THE EMPLOYER.

By way of introduction, it should be noted that there are two matters which have been argued by the other side which have absolutely no bearing to the instant case.

First, the social desirability of the BFOQ defense is *not* at issue here. As the United States Supreme Court recently stated: "the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to [Title VII]." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989). Regardless of the personal views of appellant, or the various organizations which joined in *amici curiae* brief, the BFOQ is a valid defense and Little Forest is entitled to rely upon it in making its employment decisions.

Second, the BFOQ defense may be based upon the Employer's concern for the privacy rights of its patients and this is a fact which is not subject to argument. In the instant case, the Commission itself has adopted the view that the BFOQ exemption may be invoked where the personal privacy rights of patients are at stake. (Order dated September 4, 1987 at p. 5). This holding is entirely consistent with the statute known as the "Patient Bill of Rights" which mandates that nursing homes protect the privacy of residents. O.R.C. 3721.13(A)(11). Given the public policy of Ohio to protect the right of privacy of nursing home residents, it is unfair and insulting for counsel to compare the privacy rights of nursing home residents with the much more limited right of privacy which prison inmates are entitled to. (*Amicus Brief* at p. 10). The elderly and the ill are entitled to a greater measure of privacy than a common criminal and to argue that such rights are subordinated to the expectations of a prospective employee is simply wrong.

Those matters aside, Little Forest recognizes that the BFOQ argument is an affirmative defense and that it, as the employer, has the burden of proving that the essence of its business operation would be undermined unless it could hire members of one sex exclusively. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Little Forest met this burden, and the Ohio Civil Rights Commission found, that female residents would object to intimate contact by male nurses aides. (Order dated September 4, 1987 at p. 6). Having met this burden, Little Forest established the BFOQ defense and judgment was properly entered in its favor by the Court of Appeals.

EXCERPT FROM PAGE 12 OF BRIEF OF LITTLE FOREST FILED WITH OHIO SUPREME COURT

PROPOSITION OF LAW NO. 2

AN OFFER OF EMPLOYMENT, AT A HIGHER RATE OF PAY, WITH SIMILAR TERMS AND CONDITIONS OF EMPLOYMENT, FOR THE PERFORMANCE OF COMPARABLE WORK TOLLS THE EMPLOYER'S LIABILITY FOR BACK PAY EVEN THOUGH THE EMPLOYER DID NOT OFFER EMPLOYMENT IN THE POSITION APPLIED FOR.

On May 4, 1987, Little Forest offered Mr. Lawson full time employment in the maintenance department at the nursing home. (R. at 120; Exhibit B). If Lawson had accepted the offer, his wage rate would have been one dollar ($1.00) an hour *more* than is paid to an aide. (Record at p. 587; Additional Record at p. 39). In all other respects, his terms and conditions of employment would have been identical to that of an aide. (R. at 243-245). (Both positions are in the bargaining unit represented by a union having a contract with Little Forest). This offer of employment was refused by Mr. Lawson.

The Court of Appeals correctly ruled that Lawson's claim for back pay was tolled because he refused an unconditional offer of substantially equivalent employment. *Ford Motor Company v. E.E.O.C.*, 458 U.S. 219, 232 (1981). The Court of Appeals agreed with Little Forest, and with the other courts which have ruled on this issue, that the position offered need not be "identical" but that it only needs to be "substantially equivalent." *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967 (5th Cir. 1984); *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984).

EXCERPT FROM MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION FILED WITH OHIO SUPREME COURT BY LITTLE FOREST

Case No. 90-1052

IN THE SUPREME COURT OF OHIO

LITTLE FOREST MEDICAL CENTER OF AKRON,
Appellee and Cross-Appellant,

vs.

OHIO CIVIL RIGHTS COMMISSION,
Appellant and Cross-Appellee.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Appellee and Cross-Appellant, Little Forest Medical Center of Akron ("Little Forest"), hereby moves that the Court reconsider its Mandate issued on September 4, 1991 and, upon reconsideration, that the Court remand the case, pursuant to Ohio Supreme Court Rule IX, to the Ohio Civil Rights Commission for a new trial, on the merits, to be judged based upon the recently announced legal standards articulated by the Majority of the Ohio Supreme Court on September 4, 1991. The rationale for this request for reconsideration is set forth below.

Inasmuch as the instant case is one of first impression and the elements of a BFOQ have not been previously established by the Court or by the Legislature, the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that Little Forest be given an opportunity to present evidence before the Ohio Civil Rights Commission in support of its BFOQ defense in accordance with the criteria established by the Majority opinion.

DETERMINATION OF THE EQUAL OPPORTUNITY COMMISSION

EQUAL EMPLOYMENT OPPORTUNITY COMISSION
1375 EUCLID AVENUE
CLEVELAND, OHIO 44115

DISTRICT OFFICE

In reply refer to:
Charge No. 22A876048

Rayferd Lin Lawson
509 Crosby Street, Apt. #106
Akron, OH 44302

Little Forest Medical Center
797 East Market St.,
Akron, OH 44305

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the Ohio Civil Rights Commission.

Having examined the Ohio Civil Rights Commission's findings and the record presented, I conclude that there is a reasonable cause to believe that the charge is true.

The record presented by the Ohio Civil Rights Commission includes evidence that the matter in controversy has been resolved through a hearings order.

I conclude that the remedies and relief ordered are comparable in scope to the remedies and relief mandated by Title VII.

This concludes the Commission's processing of the charge subject to the performance by the Respondent of the actions required by the above referenced order or unless the Charging Party presents to the Commission within thirty (30) days compelling reason to reopen the charge.

On Behalf of the Commission:

/s/ HAROLD FERGUSON
Harold Ferguson
District Director

JAN 20 1989
Date

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

No. 91-843

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

LITTLE FOREST MEDICAL CENTER OF AKRON,
Petitioner,

vs.

OHIO CIVIL RIGHTS COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

LEE FISHER
ATTORNEY GENERAL OF OHIO

DENISE M. JOHNSON
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Ohio Civil Rights Commission

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Ohio Civil Rights Commission, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ohio Supreme Court's opinion in this case.

STATEMENT OF THE CASE

On October 29, 1986, Rayferd Lawson filed a charge of discrimination with the Ohio Civil Rights Commission (hereinafter "Commission"). In his charge, Mr. Lawson alleged that Little Forest Medical Center of Akron (hereinafter "Little Forest") refused to hire him on the basis of his sex.

After investigating Mr. Lawson's charge the Commission issued a Complaint on July 9, 1987 alleging that Little Forest engaged in sex discrimination. Little Forest filed an answer asserting that sex was a bona fide occupational qualification for a nurse's aid position.

A public hearing was held on October 14, 1987; January 19, 1988 and May 24, 1988. The Commission filed its post-hearing brief on June 23, 1988 and the Respondent filed its post-hearing brief on July 11, 1988. The Respondent argued among other things that "once the employer has made a prima facie showing that sex is a bona fide occupational qualification the burden shifts to the Ohio Civil Rights Commission to prove that reasonable alternatives exist which would moot the need for gender based discrimination." citing as authority *Hayes v. Shelby Memorial Hospital,* 726 F.2d 1543 (11th Cir. 1984); *Wright v. The Olin Corporation,* 697 F.2d 2292 (4th Cir. 1982).

The Hearing Examiner issued a report and recommendation on August 29, 1988. The Hearing Examiner's Conclusions of Law and Discussion 1-6 set forth the following:

> "2. Generally speaking the bfoq exception to the prohibition against sex discrimination is narrowly

construed. Respondent must justify the exception and the burden is a heavy one. *Fesel v. Masonic Home of Delaware, Inc.*, 447 F.2d 1334, 19 FEP Cases 887 (3rd Cir. 1979).

3. However, depending upon the circumstances, the courts have granted an exception, where the personal privacy rights of "customers" (patients) are at stake. *Fesel, supra.*

4. In these cases Respondent has the burden of proof. Respondent must prove: (a) there is a factual basis for its belief that women would object to intimate contact by male nurse's aides, and (b) it would not be possible to assign job responsibilities in such a manner as to minimize the clash between privacy rights of the patients and the antidiscrimination provisions of Ohio's Laws Against Discrimination. *Backus v. Baptist Medical Center,* 510 F. Supp. 1191, 25 FEP Cases 8092 (E.D. Ark. 1981); *Fesel supra.*

5. Respondent proved there was a factual basis for its belief that some female patients would object to being viewed in the nude or having their genitals touched by males. The testimony of the physician who treated many of Respondent's female patients and the nurses who cared for them supported this conclusion. The Commission did not present any evidence to the contrary.

6. However, Respondent failed to prove it could not rearrange its method of assigning work to nurse's aides to eliminate the privacy problem. In fact, the evidence showed that Respondent's policy of hiring only female nurse's aides violates the privacy interests of its male patients who might object to being viewed in the nude or touched in the genital area by females. *See, Jones v. Hinds General Hospital,* 666 F. Supp. 933, 44 FEP Cases 1076 (S.D. Miss. 1987). (Hospital was required to have at least one male orderly on duty to protect male patients' privacy interests)." (Petition at p. A-55 and A-56).

Based on all the evidence presented at the hearing and the hearing examiner's recommendation, the Commission issued its Findings of Fact, Conclusions of Law and Order on October 6, 1988, which stated that the Commission had proven by reliable, probative and substantial evidence that Little Forest had discriminated against Mr. Lawson in violation of 4112.02(A) of the Revised Code.

On October 31, 1988, Little Forest filed a Complaint and Petition for Judicial Review of the Final Order of the Ohio Civil Rights Commission with the Summit County Court of Common Pleas. On September 28, 1989, the common pleas court affirmed the Order of the Commission.

Little Forest appealed the common pleas court decision to the Ninth District Court of Appeals. On April 11, 1990, the court of appeals reversed the decisions of the court of common pleas and the Commission. The court of appeals specifically held that the proof elements which are applicable to a case of discrimination based on an employer's policy which is neutral on its face but which has a disparate impact applied to Little Forest citing *Wards Cove Packing Co., Inc. v. Antonio* 490 US 642, (1989). The court of appeals further held that Little Forest had offered Mr. Lawson substantially similar work tolling Little Forest's backpay liability.

The Commission then filed a notice of appeal to the Supreme Court of Ohio with the Ninth District Court of Appeals on May 10, 1990. The Commission filed its Memorandum in Support of Jurisdiction on June 10, 1989 and Little Forest filed a cross appeal. The Supreme Court accepted the case for review on October 5, 1990.

After briefing and oral argument the Ohio Supreme Court issued an opinion on September 4, 1991 in which it articulated evidentiary standards which apply in a case where an "employer has facially discriminatory practices and the employer seeks to justify gender specific hiring criteria on the basis that such criteria constitutes a bona fide occupational qualification". The court held that the employer bears the following burdens of proof:

(1) that the gender-based criteria involve the essence of the employer's business, and

(2) either that(;)

(a) all or substantially all members of the gender excluded by the employer are incapable of performing the job safely and efficiently, or

(b) it is impossible or impracticable to make determinations of each applicant's qualifications in a non-discriminatory manner.

(Petition at p. A-11 and A-12).

The Ohio Supreme Court further held that the appellate court's basis for holding that the job offer to Mr. Lawson was substantially equivalent to that of a nurse's aid was erroneous. The Ohio Supreme Court stated that the appellate court cited no evidence or reasoning in support of its finding of substantially similar employment.

On September 13, 1991 Little Forest filed a motion for reconsideration of the Supreme Court's decision. On September 20, 1991 the Commission filed its motion contra to Little Forest's Request for Reconsideration.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The First Two Questions Presented In The Petition

The first question presented in the petition (Petition p. i) is whether gender (female) can be used as a bona fide occupational qualification for employment ("BFOQ), under Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Chapter 4112, in a patient care position in a nursing home where female residents have expressed a desire for

care by a member of the same sex.

But the Ohio Supreme Court did not decide that question in this proceeding. Moreover, the facts of record will not support a determination of that question by this Court. Beginning with the hearing examiner's report and recommendation (Petition at A-55 and A-57) which was adopted by the Respondent, the legal standard applied in the instant case is embodied in the federal court decisions of *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346, (D. Del. 1978), aff'd 591 F.2d 1334, 19 FEP Cases, 887 3rd Cir. 1979, *Bachus v. Baptist Medical Center,* 510 F. Supp. 1191, (E.D. Ark. 1981) and *Jones v. Hinds General Hospital,* 666 F. Supp. 933, (S.D. Miss. 1987). The legal standard articulated by those courts specifically sets forth evidentiary standards in a BFOQ case where the personal privacy rights of "customers" (patients) are at stake. Therefore contrary to the Petitioner's assertions (Petition p. 10) there is no disagreement as to the substantitive legal test to be applied in a BFOQ case based upon considerations of privacy. Moreover, the Ohio Supreme Court's decision is consistent with the evidentiary standards articulated in *Fesel, Bachus* and *Jones, supra.* (Petition at A-11 and A-12, n. 3).

The court of appeals ruled that the evidentiary framework articulated by this Court in *Wards Cove*[1] was applicable in this case even though the evidentiary framework in *Wards Cove* applies to a discrimination case where the employment practice is neutral on its face but has a discriminatory impact. (Petition p. A-32). The Respondent sought review of the court of appeals decision raising the following assignment of error:

> When An Employer Asserts A Bona Fide Occupational Qualification (BFOQ) Based On the Privacy Interests Of Its Clients As A Defense To Unrefuted Evidence Of Discrimination, The Employer Must Prove That It Had A Factual Basis For Believing That The Hiring Of Any Members Of

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[1] *Wards Cove Packing Co., Inc. v. Antonio* (1989), 490 U.S. 642.

> One Sex Would Directly Undermine The Essence Of The Job Involved Or The Employer's Business, And That It Could Not Rearrange Job Responsibilities In Such A Way That There Would Be A Minimal Clash Between The Privacy Interest Of The Clients And The Employment Opportunities of the Complainant. (Petition at p. A-116).

The question which was therefore decided by the Ohio Supreme Court deals with the issue of upon whom the evidentiary burdens are placed when the employer asserts the privacy interest of its clients as a basis for a BFOQ defense.

Before the Ohio Supreme Court the Petitioner argued:

> In A Case Alleging Sex Discrimination In Employment, Once The Employer Proves That The Essence Of It Business Operation Would Be Undermined Unless It Could Employ Members Of One Sex Exclusively, Then The Burden Shifts To The Complainant To Prove That Alternative Means Are Available To Moot The Need For Gender Based Discrimination And Still Achieve The Legitimate Business Interest Of The Employer. (Petition at p. A-118).

The court dismissed the Petitioner's argument by stating the following:

> It is the contention of the [Petitioner] that it may utilize the less demanding "business justification standard announced in *Wards Cove v. Antonio, supra*. However as seen in *Johnson Controls* this test is unavailable where the employer applies facially discriminatory hiring criteria." (Petition at p. A-10).

The Ohio Supreme Court's analysis of the BFOQ affirmative defense went further than the particular factual situation presented to it and outlined the evidentiary standards

articulated by this Court in *Dothard*,[2] *Western Airlines v. Criswell*[3] and *Diaz*[4] when the employer relies upon the BFOQ defense on a basis other than the privacy interest of clients. (Petition at p. A9). The privacy interest of clients is a narrow factual situation which has not been addressed by this Court and the lower courts have articulated evidentiary standards which apply to such factual situations, which, contrary to the Petitioner's assertion, recognizes that the privacy interest of clients is a valid basis for asserting the BFOQ defense. (Petition at p. A-11 n. 3).

In the Petition at p. 10 the Petitioner asserts that "[. . .] various state and federal courts disagree as to the substantive legal test to be applied in a BFOQ case based upon considerations of privacy." However the Petitioner does not cite the decisions which it claims are in disagreement.

The Petitioner argues at p. 12 that "[a] balance must be struck" between the competing rights of privacy and nondiscrimination in employment. However the Petitioner is not looking for a balance but is seeking an imbalance which would permit the employer to engage in overt discrimination without justifying its basis for doing so and therefore diminish the state and federal law's goal of ensuring equal employment opportunity. As this Court has recognized in *Dothard v. Rawlinson* and *Western Air Lines Inc. v. Criswell* the BFOQ exception to discrimination in employment constitutes an exception to the public policy embodied in Title VII as a whole to eliminate discrimination and as such is to be construed narrowly by the courts.

The second question raised by the Petitioner is inextricably intertwined with the Petitioner's failure to accept the applicable rule of law which places the evidentiary burdens

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[2] *Dothard v. Rawlinson* (1977), 433 U.S. 321

[3] *Western Airlines v. Criswell* (1985), 472 U.S. 400

[4] *Diaz v. Pan-American World Airways, Inc.* (C.A. 5, 1971), 442 F.2d 385.

in a BFOQ case upon the employer. The *Wards Cove* evidentiary framework is inapplicable to a case where the employment practice is discriminatory on its face and the employer is asserting a BFOQ defense as a basis for overt discrimination. To accept the Petitioner's argument would again ignore the *Diaz* decision's guidance to construe the defense narrowly because it is an exception to the public policy embodied in Title VII.

2. The Decision Below Does Not Raise The Third Question Presented In The Petition.

The third question presented in the petition is whether the Court's ruling in *Ford Motor Company v. EEOC*, 458 U.S. 219 (1988), requires that an offer of employment be in the "career track" of the discriminatee in order to toll the employer's backpay liability, despite the fact that the employer was offered employment at a higher rate of pay and in a position having the same terms and conditions of employment.

The Ohio Supreme Court did not decide the above stated question. At p. 18 of the Petition the Petitioner asserts that the Ohio Supreme Court's ruling is a departure from this Court's ruling in *Ford Motor.* However the Ohio Supreme Court's ruling is in agreement with the *Ford Motor* decision because this Court stated that in order for the claimant to mitigate his damages, "* * * the claimant need not go into another line of work, accept a demotion or take a demeaning position." (Appendix at p. 1). The Ohio Supreme Court's opinion is consistent with *Ford Motor* because a maintenance position such as the one which was offered to Mr. Lawson is not in the same line of work as a nurse's aid position and is also demeaning because it would require Mr. Lawson "to perform such duties as stripping and cleaning rooms while the patient was not in the room." (Appendix at p. 3).

The Ohio Supreme Court's determination that a nurse's aid position is not relevant to career development in the health care industry is in accord with this Court's statement

in *Ford Motor* that in order to mitigate damages the complainant is not required to go into another line of work or take a demeaning position. The Petitioner at p. 18 of the Petition puts great emphasis on the fact that the maintenance position which was offered to Mr. Lawson would have been for higher pay and that the hours, working conditions and pay were similar. However Websters New World Dictionary 2nd Ed. (1978) 375 defines the word demean as follows:

"to lower in status or character; degrade; humble"

The Ohio Supreme Court's decision is simply in accord with the evidence in the record which supports the fact that the maintenance position, which would have required Mr. Lawson to perform the duties of stripping and wiping floors, was lower in status than the nurses-aid position.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROPOSITION OF LAW NO. 2:

BACK PAY IN A DISCRIMINATION CASE UNDER R.C. CHAPTER 4112 IS NOT TOLLED WHERE THE COMPLAINANT REFUSES AN UNCONDITIONAL OFFER OF A POSITION THAT IS INCONSISTENT WITH HIS SKILLS, BACKGROUND AND EXPERIENCE AND INVOLVES CONDITIONS WHICH ARE SUBSTANTIALLY MORE ONEROUS THAN THE POSITION FOR WHICH HE WAS SEEKING EMPLOYMENT.

In *Ford Motor Co.* v. *EEOC* (1981), 458 U.S. 219, the United States Supreme Court held that a claim for back pay is tolled where the claimant refuses an unconditional offer of substantially equivalent employment. The court stated that the primary goal of Title VII is to end discrimination. As a result, the court found that the employer's unconditional offer to the claimant of the originally sought but denied job fulfilled the goals of Title VII. Significantly, the court also stated that in order to mitigate his damages, "* * * the claimant need not go into another line of work, accept a demotion or take a demeaning position." *Id.* at 231.

In the case at bar, Little Forest did not offer Mr. Lawson his previously denied job of nurse's aide which involved personal care of patients. Instead, Little Forest offered him a more demeaning job of maintenance man where he would have been required to perform such duties as stripping and cleaning rooms while the patient was not in the room.

In issuing the *Ford* decision, the United States Supreme Court was following a line of prior opinions on the issue of backpay. In *NLRB* v. *Madison Courier, Inc.* (D.C. Cir. 1972), 472 F. 2d 1307, the court held that an employee does not have to seek employment which is not consistent with his skills, background and experience or "which involve conditions which are substantially more onerous than his previous position." *Id.* at 1320-1321. In *Spaqnuolo* v. *Whirlpool Corp.* (W.D. N.C. 1982), 548 F. Supp. 104, *modified* (on other grounds) (1983), 717 F. 2d 114, the court ruled that an

employee demoted from a position as sales manager in violation of ADEA did not have to accept an "essentially different" position as a traveling salesman in order to mitigate his damages.

In the instant case, Mr. Lawson did not apply for a position as a janitor, rather he applied for a job as a nurse's aide or an electrical technician. The Complainant had experience as both a nurse's aide and as an electrical technician.

Based on the parameters set forth in *Ford* and other above cited cases, the Commission found that a janitorial position was not substantially equivalent to a nurse's aide position. However, the Ninth District Court of Appeals held that Little Forest made a reasonable accommodation because the position paid more and involved "substantially similar" work. Thus, the court of appeals decision would allow an employer to offer a position that may pay more but is not consistent with the employee's skills and then be relieved of back pay liability.

Supervisor or head nurse, she said that — she stated that they couldn't hire me because the female patients would object to my examining them.

Q. Have you looked for work since you were denied that job?

A. Yes, I have.

Q. And have you received any offers?

A. From Little Forest, I did.

Q. When you said you received an offer from Little Forest, what was that offer?

A. It was a job as a maintenance man.

Q. Do you know what that job would consist of?

A. Consists of mopping floors and so forth, buffing floors and thing of that nature.

Q. Did you accept that position?

A. No, I didn't.

Q. Why didn't you accept that?

A. I felt that it wasn't comparable to — it wasn't really comparable, 'cause I feel that I'm more qualified than a job as far as mopping floors and sweeping, waxing, what not.

Q. Was that the type of job you originally applied for?

A. No, it wasn't.

Q. No further questions.

Hearing Examiner Martens: Okay. It will be cross examination then.